ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

TRIBUNAL DECISIONS

1984 VOLUME 1

T/0001/84 - T/0050/84

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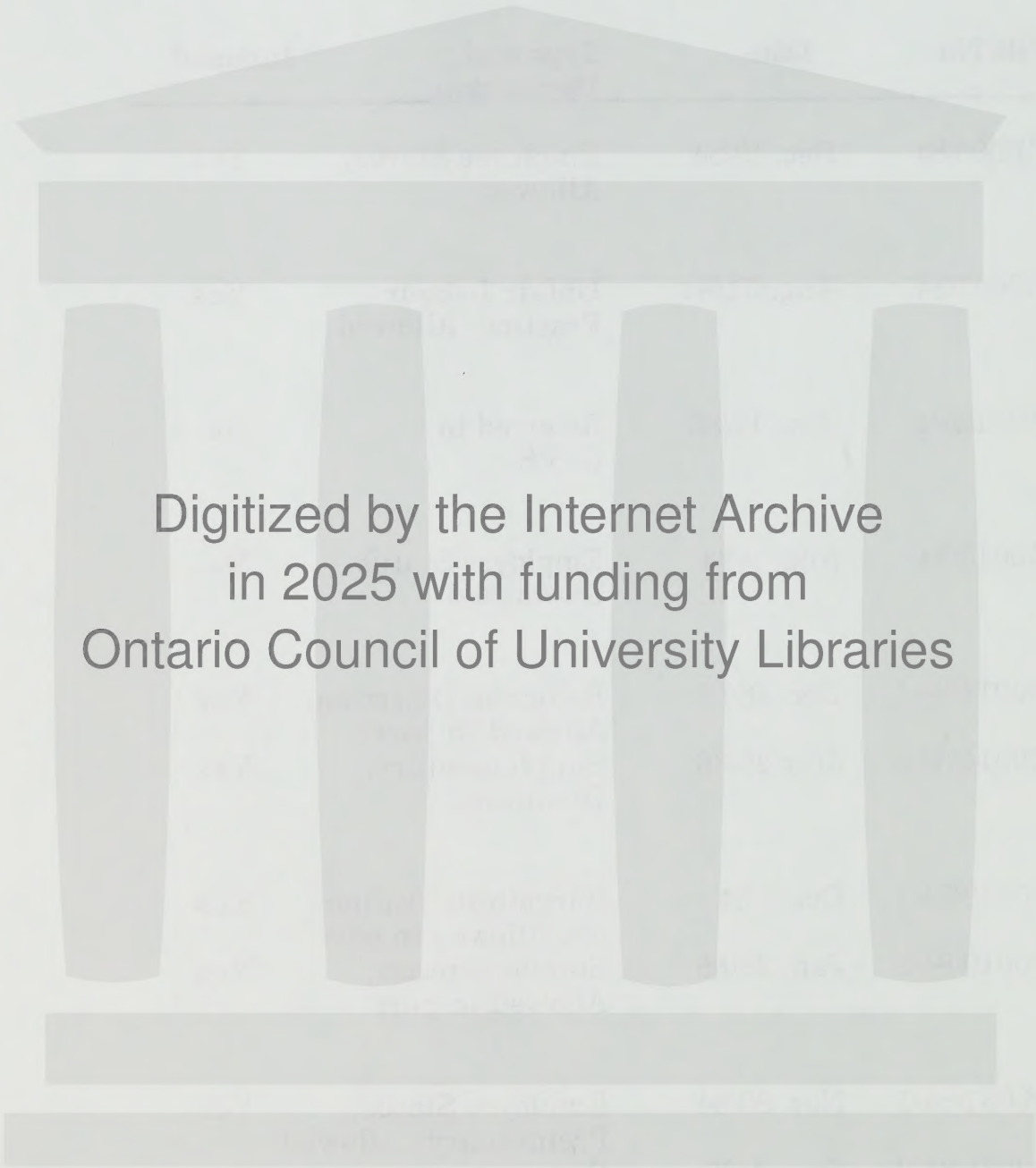
File No.	Date	Type and Disposition	Indexed
T/0005/84	Dec. 13/84	Employee Status; Allowed	Yes
T/0007/84	Aug. 31/84	Unfair Labour Practice; Allowed	Yes
T/0012/84	Apr. 19/85	Referred to G.S.B.	No
T/0013/84	Aug. 9/84	Employee Status; Dismissed	No
T/0014/84-1	Dec. 18/85	Religious Objection; Allowed in part	Yes
T/0014/84-2	July 25/86	Supplementary; Dismissed	Yes
T/0019/84-1	Oct. 4/84	Bargaining Authority; Allowed in part	Yes
T/0019/84-2	Jan. 28/85	Supplementary; Allowed in part	Yes
T/0031/84-1	Nov. 30/84	Employee Status; Preliminary; Allowed	Yes
T/0031/84-2	June 4/85	Dismissed	Yes
T/0040A/84	Mar. 22/85	Bargaining Authority; Dismissed	Yes
T/42/84	May 29/86	Trusteeship; Allowed	Yes



ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL T/5/84

Between: OPSEU (N.R. Cole, et al)

Applicants

- and -

The Crown in Right of Ontario
(Management Board of Cabinet and
Ministry of Citizenship and Culture)

Respondent

Before: O.B. Shime, Q.C., Chairman and
W. Walsh and L. Binder, Members

APPEARANCES AT THE HEARING: W.A. Lokay & others, for the Union
W.J. Gorchinsky & others, for the Employer

DATE OF HEARING: November 27, 1984

DECISION OF THE TRIBUNAL

This is an application pursuant to section 40(1) where the union claims that certain persons are employees within the meaning of the Crown Employees Collective Bargaining Act.

The Board notes the agreement of the parties that Jeanne Duperreault, Ron Janzen and David Sugarman are employees within the meaning of the Act.

The Union has advised that they are not proceeding with respect to N.R. Cole, G. Goldsworthy, Karen Alexander, Susan Glenn, Paul Jackson, Peter Donato, Ethan Herberman, Hugh Westrup, Tom West, Robert Atwood and Janice James. The proceedings with respect to these persons are terminated.

Most of the facts with respect to the remaining two persons, Jim Belanger and Timo Puhakka are agreed upon. Both of these persons are students who basically work as hosts on the weekends on either Saturday or Sunday. Sometimes they work on both Saturday and Sundays, and other times they work additional days during the week. Both are university students who work throughout the year when regular employees are not on duty and both have worked for approximately two or three years.

The sole question in these proceedings is whether these two persons fall within section 1(1)(f) of the Crown Employees Collective Bargaining Act which excludes "students employed during the student's regular vacation period..." In this matter, we are not concerned with students on a co-op educational training program and the only issue is whether employment on the different days during the weekends constitutes employment during the student's "regular vacation period".

The Employer submits, based on dictionary definitions, that the regular vacation period is a period during which school activity is suspended while the Union argues that the regular vacation period is the summer vacation period.

In our view, the weekends do not constitute part of the "regular vacation period". It may very well be that classes are not scheduled on the weekends, but it is clear that school activity is not suspended on the weekends. During that time, students are expected to read, to perform various assignments and work projects, to write essays and the like, and to study for tests and exams. There is not a suspension from activity nor is there a respite from school work within the meaning of the dictionary definitions provided by the Employer. Weekends during the school year are also not a period of exemption from work for a student for rest and relaxation.

In these circumstances, we are unable to conclude that the persons concerned should be excluded under the provisions of section 1(1)(f) of the Act. It is not necessary in this application to determine whether the Christmas vacation or reading week and other similar periods constitute a regular vacation period. In the result we determine that Mr. Belanger and Timo Puhakka are employees within the meaning of the Act.

DATED at Toronto, Ontario, this 13th day of December , 1984.

"O.B. Shime"

O.B. Shime, Q.C., Chairman
for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL T/7/84

BETWEEN: Ontario Public Service Employees Union

Complainant

- and -

The Crown in Right of Ontario
(Ministry of Community and Social Services) and Frank Drea

Respondents

BEFORE: O.B. Shime, Q.C., Chairman
E.C. Witthames, Member
J.H. McGivney, Q.C., Member

APPEARANCES AT THE HEARING: P.J.J. Cavalluzzo, and others, for the Union

R. McCully, and others, for the Employer

HEARING: April 11, 1984

This is an application pursuant to sections 19 and 29 of the **Crown Employees Collective Bargaining Act, R.S.O. 1980, c.108** (CECBA) wherein it is alleged that Mr. F. Drea, Minister of Community and Social Services has engaged in certain acts which are prohibited by the statute.

On January 23, 1984, the Grievance Settlement Board (G.S.B.), which functions as a board of arbitration under CECBA ordered the reinstatement of Wayne Tyler who had been an employee of the Ministry of Community and Social Services since August 13, 1962. Mr. Tyler had been discharged for alleged homosexual activity with a client of the Ministry. The decision of the G.S.B. reinstated Mr. Tyler to his employment and to a job where there would be no risk of contact with Ministry clients who were juveniles. It also appears from the award that Mr. Tyler's compensation was suspended for a period of one year. The G.S.B. remained seized of the matter of implementation of the remedy in the event that the parties were unable to agree on the appropriate implementation.

Mr. Drea, the Minister of Community and Social Services was unhappy with the decision of the G.S.B. and made a number of statements to that effect. It is these statements that are objected to by the complainant. (The newspaper reports and interviews are appended to these reasons). The union adduced evidence concerning those statements.

Mr. Claire Hoy, a reporter with The Toronto Sun, was called as a witness to confirm stories that he had written in that paper on February 26, 1984 and March 2, 1984. The relevant portions of those stories are as follows:

> **Toronto Sun—February 26, 1984**
>
> Social Services Minister Frank Drea has pledged to continue demoting a reinstated Kitchener welfare worker until he either quits or the Ontario Public Service Employees Union brings his case back to the grievance settlement board.

Drea was outraged over a 2-1 board decision to reinstate Wayne Tyler after a one-year suspension for having lunch-hour sex in a washroom on numerous occasions. At least once was with a mentally retarded juvenile boy who later became his client.

"We still want him fired," said Drea. "We're getting him out of Kitchener and he's going to be far down in a basement somewhere without human contact.

"We're going to keep on demoting him. We want him or the union to go back to the board. I dare the union to take me back to the board. I dare them. And if I have to demote him below the minimum wage, I'll do it," Drea said.....

Drea called the decision "a slap in the mouth to any type of discipline in the system. They're saying you can do anything you want and the taxpayer has to keep paying.

"They (the board) have held up everything of value to the public here to ridicule and I hope they're proud of themselves," he said. "I want to go back to the board on behalf of the 12,000 employees of this ministry who don't act this way. It's very unfair to them to force them to work with this person."

Opposition social service critics, NDP Richard Johnston and Liberal Bill Wrye also were critical of the board decision to reinstate Tyler.

"I really think it gives one pause," Wrye said. "Considering the fact the person was mentally retarded and a youth, I can't understand why that alone wouldn't be considered gross misconduct. Especially for someone who works in such a sensitive field."

Johnston said the evidence against Tyler was "a pretty damning case...my tendency, of course, is to try to protect employees from management but when you're dealing with a disadvantaged clientele I think the weight of the opinion should go the client."

Toronto Sun--March 2, 1984

The Wayne Tyler case is going back to the Grievance Settlement Board.

The board voted 2-1 to reinstate him with a one-year suspension and retroactive pay to Oct. 2, 1983.

Social Services Minister Frank Drea exploded. He said he'd continue demoting Tyler until he either quits or the union brings his case back to the board.

Now, it seems, Drea has his wish.

OPSEU spokesman John Ward confirmed yesterday they've asked the board to reconvene because Drea refuses to co-operate with the board order.

The board had ruled they could take another look at it if there is no agreement that Tyler be reinstated as a welfare officer as long as he can't have any contact in his job with juveniles.

Drea said earlier he won't reinstate Tyler at his job level but would demote him "so far down into the basement that he's gonna need a miner's lamp to get upstairs."

Tyler has not returned to work but Drea says if he does, he'll be moved out of Kitchener. Drea says it's unfair to other ministry workers to force them to work with Tyler.

Mr. Hoy stated that he interviewed Mr. Drea and that the portions of the story in quotation marks are direct quotes from Mr. Drea. He admitted to getting some of the story from a story that had previously run in Canadian Press.

Mr. Scott White, a reporter, also testified that he interviewed Mr. Drea on February 27, 1984, at the Ministry Offices. The following are portions of stories written by Mr. White, which he says were edited in part.

Toronto Star—February 28, 1984

A welfare worker ordered reinstated despite admitting to office-washroom sex with a retarded youth will be demoted "so far down into the basement that he's going to need a miner's lamp to get upstairs," vows an Ontario cabinet minister.

Frank Drea, minister of community and social services, says he will try to deliberately provoke another grievance by the employee in hope of "some sober second thoughts" from members of the panel who ordered him rehired....

Wayne Tyler, a 20-year employee at the ministry's Kitchener office, was fired in October, 1982, after it was learned he had sex in public and government washrooms with a 17-year-old mentally retarded youth described to the board as a homosexual prostitute. The boy became eligible for welfare when he turned 18 and Tyler was subsequently assigned to his case.

Tyler was fired, but ordered rehired by the Ontario Crown Employees Grievance Settlement Board, which said the government could not prove its case that Tyler had had sex with the youth after he became his client.

Although the board reversed Tyler's dismissal, it ruled he should be given a one-year suspension ending October, 1983, because he had sex with other men during working hours, sometimes in a washroom in the ministry building.

Drea said yesterday that, following board orders, Tyler has been given back pay to last October and is still receiving his salary.

But the minister said that unless Tyler allows officials to talk to his psychiatrist by March 15 -- the board said he should continue receiving psychiatric treatment — he will be fired.

"We want to know from his psychiatrist what is going on," he said.

Psychiatrists testified at the board hearing Tyler has shown improvement since undergoing treatment, but there are no assurances of his future behavior.

Drea warned if Tyler is rehired, he will be transferred to another community and given a demotion so he never has personal contact with welfare clients.

In fact, Drea said Tyler first would be given a clerk's job — with a possible annual wage loss of $5,000 -- and will be demoted again and again until he files another grievance.

The ministry could ask for a judicial review of the board's decision by a Divisional Court but a ministry spokesman was unable to say if there will be an appeal.

Drea said the fact Tyler is a homosexual has nothing to do with the case, but rather that he "had (sexual) relations on government time and government property.

Mr. White testified that Mr. Drea made the statements contained in the first paragraph referred to above and that the second paragraph contains the gist of Mr. Drea's remarks. He also stated that the part in quotation marks is a direct quote from Mr. Drea.

Neal Sandy, a broadcast journalist for CFRB, a radio station, interviewed Mr. Drea on February 27, 1984. The following is a portion of the script of the 11:00 p.m. news on Monday, February 27, 1984.

THORSEN: Social Service Minister Frank Drea is seeking to have a welfare case worker fired for having sex with a mentally retarded boy. Neal Sandy reports—

SANDY: 43-year-old Wayne Tyler is a Kitchener welfare worker. He had sex with a retarded juvenile boy in a government washroom. Tyler has twice been convicted of gross indecency. A settlement board wants him reinstated in his former job and given retroactive pay. Social Service Minister Frank Drea says he wants Tyler demoted and eventually fired. Drea said that if Tyler had stolen money he'd be fired immediately. He said he did something much worse and gets his job back.

DREA: Now, the defense of this guy is that he's got a sex urge that's beyond control. Hey, come on...nobody has a sex urge that's beyond control.

SANDY: Drea said Tyler didn't have sex with people on impulse while at work. He said he planned and thought out every move. Sean O'Flynn, the President of the Ontario Public Service Employees Union, has accused Drea of bullying Tyler by planning to demote him to a clerk. Drea says, quote, you can't bully a sex freak.
Neal Sandy at Queen's Park.

Mr. Sandy stated that the statements are a paraphrase of Mr. Drea's statements to him.

Mr. John Borley, a television journalist with Station CFTO, conducted an interview with Mr. Drea which was reported on the news. A portion of the CFTO news report on February 27, 1984 is as follows:

Community and Social Services Minister Frank Drea is vowing to have a Kitchener welfare worker fired. The man was involved in a number of sex acts with males in the washroom of his government office. CFTO's John Borley says the man was fired two years ago, but a grievance board has order him to be reinstated.

Frank Drea says the welfare worker will be reinstated...but he'll be moved from Kitchener, and demoted to a clerk with a fifteen percent pay cut. Drea hopes the union will fight that...so he can try again to have the man fired.

Evidence shows the worker had twice been convicted of gross indecency...and had had sex with a seventeen year old retarded boy in his office washroom. The boy later became a ministry client, but the board said there was no evidence of sex acts after that, and ordered the

man reinstated. The worker's union says Drea has over-reacted, although it agrees the man should no longer be allowed to work with juveniles.

Drea's position, however, is that this is a slap in the face to all government workers.

Mr. Robert Fisher, a broadcast journalist with the CBC interviewed Mr. Drea. The following is a report of that interview:

TRANSCRIPT: QUEEN'S PARK NOTEBOOK
CBLT NEWSFINAL
March 2, 1984

ROBERT FISHER: Frank Drea on the case of a welfare worker fired for acts of homosexual sex in a washroom of a government building in Kitchener.

The man was ordered reinstated. Drea angered by that decision and is widely quoted as threatening to demote the man so far down in to the basement that he's going to need a miner's lamp to get upstairs. Endquote. Now the case is going back before the province's Grievance Settelement (sic) Board. But does Drea have any regrets about his comments?

FRANK DREA: Are you kidding. Think of an original one will ya.

Typed by: Roula Rovaiso
April 11, 1984

At the outset, it is important to note that no claim is made by the respondent that he is immune from the requirements of law and particularly CECBA. Nor is he immune; he is subject to the rule of law as articulated by Dicey, that "not only is no man above the law, but every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals..." That principle has been adopted by The Supreme Court of Canada in Roncarelli v. Duplessis, (1959) S.C.R. 121 where the Premier of Quebec was found liable for damages.

The principle of equality before the law applies as well in matters of labour relations. See eg. ACTE & McGeer et al (1979) 3 Can L.R.B.R. 454 (B.C.L.R.B.); Fleck Manufacturing Co., (1978) 2 Can L.R.B.R. 142 & 396 (O.L.R.B.).

There is a second important issue in this case and that is the right of free speech. It is important to apply the rule of law to all men but it is also important that we do not apply the law so as to inhibit free speech. Everyone should have the right to comment upon matters of public importance and it is important that the public be kept informed by the uninhibited flow of information that results when freedom of speech is secured.

Free speech not only implies the right to comment but also the right to criticize. Indeed, labour relations tribunals, which are habitually involved in controversial matters are often the subject of criticism by politicians, trade union leaders, employers, members of the public and the press, and that is the way it should be. It is difficult, in times when Parliament, the Legislature, the Church, business and trade unions and leaders in all spheres of life are being criticized to stifle criticism of labour relations boards and tribunals. Indeed, it is, in our view, wrong, even for a labour relations tribunal, to invoke that anachronistic device of contempt in its own protection,— a device that is used only by courts to curb criticism and to give the administration of justice a special status in the community which is difficult to justify. The strength of labour relations tribunals must lie in their expertise in dealing with labour problems and the cogency of their reasons in explaining the resolutions of those problems.

However, we recognize, as did the British Columbia Labour Relations Board in Acte and McGeer et al supra, that, "freedom of expression is subject to some restraints." In the McGeer case, the Board said at p. 147,

> The claims of Ministerial freedom of expression must weigh heavily in the balance in the appraisal of complaints...lodged under the broad language of section 5 of the Labour Code.
>
> But the point of my legal ruling is that the scales are not absolutely and inevitably tipped in favour of Ministerial Speech. Freedom of speech outside the Legislative Assemply is ultimately subject to some legal restraints, designed to protect the freedom of other individuals. Typically, the law has been used to protect an individual's right to be free from defammatory comments injuring his reputation. In that case, the law in question--Section 5 of the Labour Code--protects the employee's right to be free from heavy-handled intimidation, intended to influence him to give up his trade union. A judgment about whether the statements made in this case were the legitimate exercise of free speech on matters of public concern, or whether they strayed across the boundaries of wrongful coercion of union members, is one that can only be made after a careful examination of the facts.

In Fleck Manufacturing Co. supra, the Ontario Labour Relation Board confirmed that view in the following manner at p. 406.

> It is not uncommon for persons holding political office to take strong positions on matters of labour relations policy and to take strong positions in particular industrial disputes. In so doing it is not uncommon for them to take sides and to do so with deep conviction. It would be unrealistic, and indeed undesirable, to expect persons in political life to adopt an apolitical attitude to all industrial disputes or to always display the dispassionate face of the mediator.
>
> But as with employees, employers and indeed all citizens, the freedom of expression enjoyed by members of the Legislature outside the House is not absolute. It is no more lawful for a holder of public office, albeit out of a deeply felt concern for his constituency, to convey on the part of an employer statements that threaten, intimidate and unduly influence employees to fear for their job security and thereby refrain from exercising their rights under the Act, than it is for a member of the Legislature, under the guise of free speech and out of an equal concern for his constituents; to incite employees to participate in an unlawful strike against their employer.
>
> We adopt the positions taken by those two Boards and hold that freedom of speech outside the legislature is subject to the legal restraints imposed by the legislature under CECBA. Just as freedom of expression is subject to the laws of defamation so too it is subject to CECBA which protects other legitimate interests, and freedoms in our society associated with belonging to a trade union and engaging in collective bargaining.

Cases of this type involve the Tribunal in weighing legitimate and competing interests and determining whether the speech complained about violates the provisions of the **Act**, and each case must be decided on its particular facts.

In this matter, the union complains that Mr. Drea comments violated sections 19 and 29 of the **Act**. Section 19 is the general arbitration provision providing the right to arbitrate and, generally, the powers of the Grievance Settlement Board including the right to file arbitration decisions in the Office of the Registrar of The Supreme Court so as to enable the decision to be entered as a judgment of the Court and enforceable as such. The relevant parts of Section 29 relied upon by the complainant are as follows:

> 29(1) No person who is acting on behalf of the employer shall participate in or interfere with the selection formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.
>
> (2) The employer or any person acting on behalf of the employer shall not,
>
> (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;
>
> (b) impose any condition on an appointment or in a contract or employment that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act;
>
> (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act; or
>
> (3) No person or employee organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of an employee organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act. 1972, c. 67, s. 27.

The complaint submits that Mr. Drea's remarks affect, (1) the right to grieve, (2) the right to rely upon the final and binding decision of the Grievance

right to implement and enforce the decision of the G.S.B., (5) the right to be represented by a trade union without interference by the employer and (6) the right of the union to represent employees without interference by the employer.

The union submits that no motive is required to support a violation of section 29. It states that Mr. Drea has crossed the permissible boundaries of free speech and used coercion, intimidation and threats which have violated a number of the grievor's rights under section 29.

The respondent submits that criticism of arbitration boards and other administrative tribunals is a healthy phenomenon and that the credibility of CECBA was not in question. The respondent submits that the Minister must have the right to speak out clearly and forcefully on matters of public concern. The respondent also submits that the statements and evidence relied upon by the complainant should be disregarded as being merely reporters' views of what was said.

The respondent argues that the facts do not support the allegation that the rights of the union or the employees in relation to the trade union were affected. It also argues that decisions of the G.S.B. are final and enforceable as provided in section 19(1) and that there is a remedy with respect to complaince under section 19(6). Also the respondent states that problems of implementation may be dealt with by the G.S.B.

At the outset, it is our view, in the absence of any evidence from the respondent, either justifying, explaining, or denying the remarks, that the statements attributed to Mr. Drea by the reporters are either statements made by him or reflect the gist of his remarks. We find that Mr. Drea stated that he would demote the grievor so far down into the basement that he would need a miner's

lamp to get upstairs and that he made other remarks suggesting that he would fire the grievor. Those remarks must be assessed in the light of the applicable legislation. It is not our function to sit on appeal or to review the decision of the G.S.B. in the Tyler matter—the merits of that matter are not before us. For our purposes, the remarks of Mr. Drea must be weighed in the context of a legally binding order of the G.S.B. ordering the reinstatement of an employee and Mr. Drea's response to that legally binding order.

It is our view that these remarks are specific to the situation confronting the minister. He was responding to a particular grievor and a particular order. His remarks as such, and as argued by the employer, do not have any broader ramifications.

All of these statements must be weighed in the context of an employer which has accepted and complied with numerous orders of the G.S.B. and a union which has been vigorous in its pursuit of employee rights. This is not the usual unfair labour practice case that one finds in the private sector where an employer tries to impede or interfere with a union's organizing campaign or the employee's right to be represented by a union. The employer, here, the Government of Ontario, has long accepted the union as the bargaining agent for employees and adheres to its duties and responsibilities to treat with the union in the usual areas of collective bargaining. Apart from negotiations and the resolution of differences, the Government, as employer, has settled numerous grievances with the union to the benefit of the employees and has adhered or complied with numerous decisions of the G.S.B. which have been in favour of the union.

The union, while it too, has resolved numerous grievances with the employer, and has accepted and complied with numerous decisions of the G.S.B. which have not run in its favour, has always pursued the rights of its members with vigour and taken steps if necessary to ensure that all orders and decisions of the G.S.B. have been complied with.

We do not view Mr. Drea's remarks, specific as they are, to one individual, as altering the Government's previously demonstrated willingness to comply with decisions of the G.S.B., nor do we view these remarks as factors which will inhibit the union's keen pursuit of its members' rights. We also do not view the remarks of Mr. Drea as chilling the appetites of individual employees who wish to have specific and perceived errors vindicated by the filing of grievances.

Accordingly, we do not accept the union's argument that its right to represent without interference or its members' rights to be represented without interference have been impaired.

Nor is it our view that the remarks destroy or affect anyone's right to an impartial hearing before the G.S.B. The remarks obviously imply that Mr. Drea does not agree with the decision of the G.S.B. There is not a law compelling Mr. Drea to agree nor should it be so required. Indeed, as we have indicated, disagreement is a fundamental right which is entitled to be voiced. The G.S.B. is not and should not be immunized from disagreement and criticism.

We also, are of the opinion, that a board such as the G.S.B. with union and employer representatives and independent chairmen is not likely be be affected by statements of Ministers or even trade union officials indicating their strong disagreement with decisions of that board. Moreover, the suggestion that

the G.S.B. might have "second" thoughts confirms that the Minister will return to the G.S.B. and thus attorn to its jurisdiction in order to resolve matters of this nature. The statements, while perhaps disagreeing, recognize that ultimately the G.S.B. must rule on disputes of this nature where they arise between the Government and the union or the the Government and its employees.

Accordingly, we find, contrary to the union's submissions, that the statements are not likely to influence the G.S.B. and to prejudice an impartial hearing.

The other rights that are said to be infringed are the right to grieve, the right to rely upon the final and binding settlement of the G.S.B. and the right to implement and enforce the decision of the G.S.B. Before turning to those rights it is important to analyze the effect of Mr. Drea's remarks on the grievor.

Prior to the advent of collective bargaining, the employer could unilaterally, arbitrarily and capriciously deal with employees. Power lay in the hands of the employers; the introduction of labour relations statutes along with collective bargaining sought to redress the imbalance of economic power by granting to employees greater rights. One of those important rights was the right to have legitimate and perceived wrongs redressed through the grievance and arbitration procedure. Also, the employer was prohibited from using intimidation, coercion, threats and penalties against the employees. Intimidation, coercion and threats are not limited to strongarm methods or physical attacks. While they may include such methods, they also imply more than that. After all, we are not dealing with the Criminal Code and although CECBA does have quasi criminal sanctions, it is essentially a statute dealing with the regulation of employment relationships and it is in this context that terms like intimidation, coercion and threats must be read. Bearing in mind that this is an employment statute which

attempts to adjust the economic imbalances that prevailed prior to the enactment of CECBA, it is our view that the terms coercion and intimidation include economic pressure and that an employee is protected from the abuse of economic power or from threats and penalties which suggest he or she may be economically affected in an adverse manner. The balancing of Mr. Drea's right to freedom of expression must be weighed against the equal rights of the employees to freedom of association and the protection afforded to employees by CECBA. The Supreme Court of the United Stated has stated in balancing the right to free expression against the rights of employees that

> ... any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a non-permanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk... NLRB v Gissel Packing Co. (1969) 395 U.S. 575; 71 LRRM 2497 (U.S. Sup Ct) per Warrent CJ.

Thus the remarks that the grievor will be demoted and perhaps fired suggest that he will be affected economically in an adverse manner and thus the remarks fall within the terminology contained in section 29(2) and (3) of the Act.

It only remains to determine whether the remarks in context are in violation of the statute. It is clear if the remarks are intended to cause an employee to refrain from exercising any other right (s.29 2(c)) or any other rights (s. 29(3)) under the Act; they fall within the onus of of prohibited activity.

In a technical sense, since the grievor had filed a grievance and had a hearing before the G.S.B., his right in that regard has not been interfered with. However, the expectation of anyone who grieves is that the resultant decisions, orders and directions of the G.S.B. will be complied with, not only in form but also

in spirit and more particularly that where an employee is ordered reinstated that the employer, dissatisfied with the decision, will not use its economic power to circumvent the decision or bring about a result, other than was intended by the G.S.B. It is the duty and the obligation of the employer to comply with the decisions of the G.S.B. and it is the right of the employee to have compliance in the customary and historical sense. The right to grieve is thus the right to pursue the grievance to its logical end. Mr. Tyler cannot rely on that compliance because the remarks by Mr. Drea suggests that he will use other means to bring about the grievor's termination--either by unilateral action on the part of the employer or by manipulating the employment situation so that the grievor finds it intolerable and leaves. That type of conduct in our view is a breach of the employer's duty and obligation under the **Act** and violates the grievor's rights, and the threat of utilizing those means is not only a threat under section 29 2(c) but intimidation or coercion under sections 29 2(c) and 29(3).

Thus, the employee's right to rely on the decision of the G.S.B. or to have that decision implemented in the customary and historical sense in accordance with the rule of law has been jeopardized. In these circumstances, the remarks are calculated to have a chilling effect on Mr. Tyler's pursuit of a remedy. In short, because of the remarks, Mr. Tyler may feel that to pursue the matter beyond the mere decision of the G.S.B. is futile because he will be frustrated and so will the decision of the G.S.B. The remarks therby, are calculated to cause Mr. Tyler from refraining to pursue his right to have the decision implemented in a proper manner and as such constitute a violation of the **Act.** There is ample scope for freedom of expression including criticizing and disagreeing without violating an employee's rights under the **Act.**

Two other matters must be dealt with. First, it is argued that there is no anti-union motive. However, we are satisfied that the conduct and remarks are

so inherently destructive of the grievor's rights that Mr. Drea must have intended the very consequences which are foreseeable and which inescapably flow from its actions. The motive or intent is inherent in the very words used. Webster Horsfall 60 C.L.L.C. 16,050; (1969) O.L.R.B. Rep. 780.

Also, in the absence of any evidence from the employer which would explain the remarks or characterize them as being different, it is our view that a reasonable inference may be drawn that the intent of the remarks was to discourage Mr. Tyler from pursuing the grievance and the decision dependent on it or to refrain from exercising a right under the Act.

The second matter raised by the employer concerns the right of the employee to pursue the matter to its logical end by having the G.S.B. render a more conclusive decision since it remained seized of the matter insofar as implementation was concerned, and to file that decision in the Supreme Court and have it enforced as if it were a judgment or that court pursuant to section 19(6).

The simple answer to that argument is that if there are alternate remedies available under the Act there is no reason to compel a choice of one over the other. Also there may be circumstances where this Tribunal which has a responsibility for administering the Act on a day to day basis might treat such a matter somewhat differently from a Court. Since this is the first case of its nature we see no reason at this early time to foreclose any of the options that are available to the parties governed by the legislation. We recognize that there may be circumstances where the employer as well as the union might prefer a ruling and a remedy administered or implemented by the Tribunal and visa versa. Thus we are not prepared to compel the complainant to utilize the remedies pursuant to section 19 rather than to utilize the course that it has.

It is apparent that section 19 contains a more direct and immediate method of enforcing the decision of the G.S.B. Moreover, the decision of the G.S.B. is not conclusive because, while it ordered the grievor to be reinstated, it also ordered that he "be placed in a job where there will be no risks of contact with Ministry clients who are juveniles". The Board then stated it would remain seized of the matter of implementation in the event that the parties were unable to agree as to the appropriate implementation. Thus insofar as the grievor is concerned, the certainty of the position to which he has been reinstated has not been established as of the date of this hearing.

Once that is established, of course, he has available to him the remedies of section 19(6) of the **Act** and thus Enforcement by the courts. If the employer continues to refuse to comply and Mr. Drea's words are translated into deeds, the issues raised would then have a more serious significance.

In a sense, therefore, this application is somewhat earlier than it might have been. We are of the view that while the complainant had a right to pursue this application that it would have been the better course to complete the arbitration, in the sense that a conclusive remedy be spelled out by the G.S.B., and then taken the avenue directly related to the enforcement of the **CECBA** under section 19. The route now taken is not as direct.

In these circumstances and since the impact of the remarks made were not as wide or as great as the complainant has perceived them to be, it is our view, that the order made not be as extensive as the order requested by the complainant. Accordingly, we determine that a simple declaration and direction will suffice.

Accordingly, we declare that the Respondents have violated sections 29 (2)(c) and 29(3) of the Act and direct that the respondents cease and desist from similar conduct which might further violate the **Act.**

DATED at Toronto, Ontario, this 31st day of August, 1984.

O. B. Shime, Q.C.
For the Majority

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DISSENT

I have had the privilege of reading the Decision of the Majority who for the reasons set forth find that the statements of the Hon. Frank Drea constitute intimidation, coercion and threats contrary to Section 29 (2)& (3) of the Crown Employees Collective Bargaining Act (the "Act").

It is my view, having regard to the facts and to the context, that the words used by Mr. Drea do not constitute intimidation or coercion under Section 29 nor are they seen as being a threat to the grievor, Mr. Wayne Tyler. It is significant that the Grievance Settlement Board ("G.S.B.") remained seized of the case pending Mr. Tyler's placement in employment pursuant to the terms of its decision and that the employer and union were engaged in discussions which may have led to a mutually satisfactory placement, or, failing that, a final decision of the G.S.B. In any event, the final disposition of the G.S.B. decision would be enforceable under Section 19 of the Act in the same manner as the Supreme Court judgement. If there was any real concern that the G.S.B. decision was being thwarted, all that needed to be done was to bring the matter back to the G.S.B. for a final decision which would be enforceable under Section 19 of the Act. The rights which the Act assures to Mr. Tyler in this context are the right to a fair hearing before the G.S.B. and the ability to enforce against the employer any G.S.B. decision. As the Majority points out, the

most expeditious route to the realization and enjoyment of Mr. Tyler's rights is through the uninterrupted pursuit of a final G.S.B. decision. Had the decision been frustrated by the employer that fact would be cogent evidence to support the Complainant's allegations under Section 29 of the Act, and, on the other hand, Mr. Tyler's placement in employment pursuant to a final G.S.B. decision would be cogent evidence that Mr. Drea's comments were not intended as a threat to the grievor. Where alternate remedies are available to the parties, the Majority view is that the Tribunal should not dictate to the parties the remedy to be pursued, however, in this case the grievor had elected to pursue the arbitration remedy, and, his failure to pursue that remedy to a conclusion before taking up the pursuit of a different remedy, would, on the basis of the Majority decision, seem to encourage multiplicity of proceedings, which in some cases may be warranted, but in this case is of doubtful efficacy, because, as pointed out above the implementation or otherwise of the final G.S.B. decision would be cogent evidence and probably a final answer to any allegation concerning Mr. Drea's statement brought under Section 29 of the Act.

I'm concerned with another aspect of the Majority decision and that is it has the affect of circumscribing the right of a Minister of the Crown to make a political statement.

I do not suggest that Mr. Drea enjoys a freedom of speech that is not enjoyed by the ordinary citizen nor that Mr. Drea's freedom of speech is absolute. Clearly, restrictions exist in both the common law and by statute which define the area of permissible conduct.

In this case, it is significant that Mr. Tyler was an employee of the Ministry for which Mr. Drea had ministerial responsibility and Mr. Tyler was alleged to have engaged in homosexual activity during working hours and on Ministry premises with a juvenile client, again, of the same Ministry for which Mr. Drea had ministerial responsibility. Having regard to these responsibilities and the abhorrent nature of the grievor's conduct, the perceived unpopularity of the G.S.B. decision, the Minister presumably felt obliged to make it clear that he was critical of the G.S.B. decision and to place as much distance as possible between his position as Minister and the G.S.B. decision.

I regard the Minister's statement as pure hyperbole, clear exaggeration, the use of which is not unknown in either the political arena or in discussions of labour/management issues. Recognizing the public's stake in free debate, I believe it is difficult and for that reason unwise, except in the clearest cases, to circumscribe a Minister's freedom of speech. It is my respectful assessment of the Minister's statements that they do not fall so clearly into that area of prohibited conduct as to warrant the Tribunal to so characterize them. I am somewhat fortified in that view by

the recognition that the Complainant is asking the Tribunal to protect the rights of an individual, and as important as those rights are, they are in a very real sense in these circumstances competing with the public's interest in freedom of speech. As one writer has observed, "... we would attach less weight vis-a-vis the administration of justice to the protection of private interests ... and greater importance to public rights such as freedom of speech." N.V. Lowe, H.F. Rawlings, "Laws Protecting Administration of Justice", (1982) Public Law 418, 441.

In my view, the Minister's statements do not fall clearly into an area of prohibited conduct, and while this is not a facile characterization that view is reenforced by the public's stake in the freedom of speech.

JOHN H. MC GIVNEY

T/7/84

Drea: That you can virtually be given a license, that you can use govt facilities, in any manner shape or form that you want in the most repugnant and repulsive ways known to man and the govt really can't do very much about it.

that you can virtually be given a licence,
that you can use government facilities,
in any manner shape or form that you
want in the most repugnant and
repulsive ways known to man and the
government really can't do very much
about it.

I don't think he should have
been fired, I think everyone is entitled to a job
regardless, I mean regardless, everybody,
you can't cast stones at other people
and everyone has their own problems

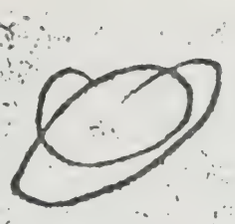
Drea - jb - WB sovtr 1:10 late night news

12

Community and Social Services Minister Frank Drea, is vowing to have a Kitchener welfare worker fired. The man was involved in a number of sex acts with males, in the washroom of his government office. CFTO's John Borley says the man was fired two years ago, but a grievance board has order him to be reinstated.

take sovtr
to end 1:10
ends..queens park

drea-jb- feb 27/84 NB



Drea

Frank Drea says the ~~[redacted]~~ welfare worker will be re-instated...but he'll be moved from Kitchener, and demoted to a clerk with a fifteen percent pay cut ~~[redacted]~~. Drea hopes the union will fight that...so he can ~~[redacted]~~ try again to have the man fired.

clip 10 Drea - see attached sheet

Evidence shows the worker had twice been convicted of groos indecency...and had ~~been~~ had ~~[redacted]~~ sex with a seventeen year old retarded boy in his office washroom. The boy later became a ministry client, but the board said there was no evidence ~~after sex~~ of sexual after that,

14

report

Ex 7

SCRIPT - 11:00 PM NEWS
MONDAY, FEBRUARY 27/84

THORSEN: Social Service Minister Frank Drea is seeking to have a welfare case worker fired for having sex with a mentally retarded boy.
Neal Sandy reports--

SANDY: 43-year-old Wayne Tyler is a Kitchener welfare worker. He had sex with a retarded juvenile boy in a government washroom. Tyler has twice been convicted of gross indecency. A settlement board wants him reinstated in his former job and given retroactive pay. Social Service Minister Frank Drea says he wants Tyler demoted and eventually fired. Drea said that if Tyler had stolen money he'd be fired immediately. He said he did something much worse and gets his job back.

DREA: Now, the defense of this guy is that he's got a sex urge that's beyond control. Hey, come on...nobody has a sex urge that's beyond control.

SANDY: Drea said Tyler didn't have sex with people on impulse while at work. He said he planned and thought out every move. Sean O'Flynn, the President of the Ontario Public Service Employees Union, has accused Drea of bullying Tyler by planning to demote him to a clerk. Drea says, quote, you can't bully a sex freak.
Neal Sandy at Queen's Park.

STAR Tues Feb 28 p. C7

E43

Drea vows to demote staffer in sex scandal

A welfare worker ordered reinstated despite admitting to office-washroom sex with a retarded youth will be demoted "so far down into the basement that he's going to need a miner's lamp to get upstairs," vows an Ontario cabinet minister.

Frank Drea, minister of community and social services, says he will try to deliberately provoke another grievance by the employee in hope of "some sober second thoughts" from members of the panel who ordered him rehired.

Wayne Tyler, a 20-year employee at the ministry's Kitchener office, was fired in October, 1982, after it was learned he had sex in public and government washrooms with a 17-year-old mentally retarded youth described to the board as a homosexual prostitute. The boy became eligible for welfare when he turned 18 and Tyler was subsequently assigned to his case.

Tyler was fired, but ordered rehired by the Ontario Crown Employees Grievance Settlement Board, which said the government could not prove its case that Tyler had had sex with the youth after he became his client.

One-year suspension

Although the board reversed Tyler's dismissal, it ruled he should be given a one-year suspension ending October, 1983, because he had sex with other men during working hours, sometimes in a washroom in the ministry building.

Judicial review

In fact, Drea said Tyler first would be given a clerk's job — with a possible annual wage loss of $5,000 — and will be demoted again and again until he files another grievance.

The ministry could ask for a judicial review of the board's decision by a Divisional Court but a ministry spokesman was unable to say if there will be an appeal.

Drea said the fact Tyler is a homosexual has nothing to do with the case, but rather that he "had (sexual) relations on government time and government property.

"It was a gross abuse of his job."

In the controversial ruling, which grievance board vice-chairman Richard McLaren of London called one of the most difficult cases he has handled, evidence showed Tyler first met the retarded youth at a Waterloo bowling alley.

Tyler later paid to have sex with the youth on at least two occasions — he pleaded guilty to criminal charges of gross indecency with the youth and another man and was given a suspended sentence with two years' probation — but he denied having relations with the boy after he became his client.

The board said the ministry failed to prove Tyler had sex with the youth after becoming his welfare worker, the main reason for firing him. CANADIAN PRESS

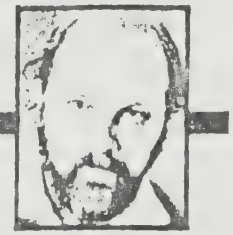
Sun Friday March 2 p. 2

ch 2, 1984

A Drea of ligh

CLAIRE HOY

At Queen's Park



The Wayne Tyler case is going back to the Grievance Settlement Board.

Tyler, of course, is the Kitchener welfare worker who was fired for having lunch-hour sex in an employee washroom on numerous occasions, including paying for sex with a mentally retarded juvenile who later became his client.

Most people would consider such activity inappropriate, especially for a welfare counsellor whose clients are mentally retarded.

As a result, the social services ministry fired him Oct. 1, 1982.

The firing started a series of knees jerking madly over at Ontario Public Service Employees Union headquarters, and they took up Tyler's cause, defended him at the grievance board hearing and, incredibly, won.

The board voted 2-1 to reinstate him with a one-year suspension and retroactive pay to Oct. 2, 1983.

Social Services Minister Frank Drea exploded. He said he'd continue demoting Tyler until he either quits or the union brings his case back to the board.

Now, it seems, Drea has his wish.

OPSEU spokesman John Ward confirmed yesterday they've asked the board to reconvene because Drea refuses to co-operate with the board order.

The board had ruled they could take another look at it if there is no agreement that Tyler be reinstated as a welfare officer as lon[illegible]s he can't have any contact in his job with juveniles.

A date hasn't been set but Ward said it usually takes two or three weeks to get it back on the agenda.

Both Drea and OPSEU President Sean O'Flynn traded insults over the case and Solicitor-General George Taylor has asked for a police report to see if all possible charges had been laid in the washroom incidents.

In the meantime, the board sent investigator Harry Waisglass to study the case. Waisglass met both parties all day Wednesday but nothing was settled.

"Our position is that he (Tyler) shouldn't lose money on his reinstatement," Ward said. "Obviously, Drea doesn't agree. But we're carefully avoiding any emotional outbursts here . . . this case has already been exacerbated by all the rhetoric."

A good thing, too.

Even the union must be holding its collective nose, having to defend a guy convicted twice of gross indecency under the Criminal Code and who admits to bein "washroom sex."

Drea said earlier h his job level but woul into the basement miner's lamp to get u

Tyler has not retur if he does, he'll be mc says it's unfair to c force them to work w

Drea won't talk abc asked him not to, bu they are "happy" the board.

One can hope bo McLaren, who servec ing, and panel mem joined McLaren in will reconsider their

Their main argume sion over whether o retarded youth for fel client, as the boy cla

As if that matters. paid him earlier, and sex, using his employ ministry premises.

In his dissenting vc since Tyler admitted than five separate oc entitled to expect n ering the sensitive na

Toronto Sun Sunday Feb 26 p.5

DREA OUTRAGED AT WELFARE SEX SCA

'We want him fi

By CLAIRE HOY
Staff Writer

Social Services Minister Frank Drea has pledged to continue demoting a reinstated Kitchener welfare worker until he either quits or the Ontario Public Service Employees Union brings his case back to the grievance settlement board.

Drea was outraged over a 2-1 board decision to reinstate Wayne Tyler after a one-year suspension for having lunch-hour sex in a washroom on numerous occasions. At least once was with a mentally retarded juvenile boy who later became his client.

"We still want him fired," said Drea. "We're getting him out of Kitchener and he's going to be far down in a basement somewhere without human contact.

"We're going to keep on demoting him. We want him or the union to go back to the board. I dare the union to take me back to the board. I dare them. And if I have to demote him below the minimum wage, I'll do it," Drea said.

In its Jan. 23 ruling, the board agreed that Tyler often used his key to the employee washroom for homosexual "washroom sex" and that expert testimony showed there was no guarantee it wouldn't happen again.

The board ruled Tyler be reinstated, with back pay to Oct. 2, 1983, but that he be placed in a job where he has no contact with juveniles.

Drea called the decision "a slap in the mouth to any type of discipline in the system. They're saying you can do anything you want and the taxpayer has to keep paying.

"They (the board) have held up everything of value to the public here to ridicule and I hope they're proud of themselves," he said. "I want to go back to the board on behalf of the 12,000 employees of this ministry who don't act this way. It's very unfair to them to force them to work with this person."

Opposition social service critics, NDP Richard Johnston and Liberal Bill Wrye also were critical of the board decision to reinstate Tyler.

"I really think it gives one pause," Wrye said. "Considering the fact the per-

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ONTARIO PUBLIC SERVICE
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180 DUNDAS STREET WEST. TORONTO, ONTARIO. M5G 1Z8 - SUITE 2100

TELEPHONE: 416/598-0688

Between:

T/12/84

OPSEU (James Konya)

Applicant

- and -

The Crown in Right of Ontario
(Ministry of Natural Resources)

Respondent

Before: Owen B. Shime, Q.C., Chairman
J. H. McGivney, Q.C. and
E. McIntyre, Tribunal Members

Appearances at the Hearing:

For the Applicant: M. I. Rotman, Counsel and others

For the Respondent: Linda H. Kolyn, Counsel and others

Date of Hearing: April 19, 1985

Having regard to the particular circumstances of this case, the Tribunal determines that this is an appropriate matter to be dealt with by the Grievance Settlement Board, subject to the Union's right to return to this Tribunal and the Employer's consequent right to raise the issue of jurisdiction, should it be necessary.

DATED at Toronto, Ontario, this 19th day of April, 1985.

O. B. Shime, Q.C.
Chairman
for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL T/13/84

Between: Canadian Union of Public Employees
Local 1750

Applicant

- and -

Workers' Compensation Board

Respondent

Before: O. B. Shime, Q.C., Chairman
W. Walsh & J. H. McGivney, Q.C., Tribunal Members

Appearances at the Hearing: G. O. Jones, and others, for the Union
B. Bowlby, and others, for the Employer

Hearing: June 20, 1984

DECISION

Having regard to the evidence and to the submissions of the parties, the Tribunal determines that the Ethnic Services Specialist is not a person employed in a managerial or confidential capacity and is an employee within the meaning of the Act.

Having regard to the evidence and the submissions of the parties, the Tribunal determines that Mr. R. Lofranco, Director, Ethnic Services Branch, spends a significant portion of his time in the supervision of employees and that his secretary, Mrs. A. Tersigni, is employed in a position confidential to Mr. Lofranco and, accordingly, is not an employee within the meaning of section 1(1)(vi) of the Crown Employees Collective Bargaining Act.

DATED at Toronto, Ontario, this 9th day of August, 1984.

O. B. Shime, Q.C., Chairman
for the Tribunal

T/0014/84-1

Crown Employees Collective Bargaining Act, R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0014/84

BETWEEN: Ms. Rose Marie MacLean

Applicant

- and -

Ontario Public Service Employees Union

Respondent Employee Organization,

- and -

Ontario Ministry of Community and Social Services

Respondent Employer or Agency of the Employer.

BEFORE: Owen B. Shime, Q.C., Chairman
B. Walsh, Member
L. Binder, Member

FOR THE APPLICANT: N. A. Keith
Counsel
Mathews, Dinsdale & Clark
Barristers & Solicitors

FOR THE RESPONDENT EMPLOYEE ORGANIZATION: P. Cavalluzzo
Counsel
Cavalluzzo, Hayes & Lennon
Barristers & Solicitors

FOR THE RESPONDENT EMPLOYER: No Appearances

HEARING: June 19, 1984

DECISION

This is an application pursuant to Section 16 of the Crown Employees Collective Bargaining Act wherein the applicant requests relief from paying dues or contributions to an employee organization.

The applicant is employed by the Ministry of Community and Social Services and has been a member of the union since 1978. In September of 1983 she volunteered as a union steward and was accepted in that position. She continued to be active in the union as a union steward until February 1984 when she found that the union had taken a pro-choice position on the issue of abortion.

As a result of the position taken by the union, Mrs. MacLean, who is Roman Catholic, withdrew as an active member of the union and now seeks to have her contributions remitted to a charity rather than the union.

She asserted that she feels very strongly about abortion and is opposed to giving her funds to a union that is opposed to everything she is for. Mrs. MacLean is deeply religious, she supports the church, she teaches religious classes to public school children, attends a Tuesday evening prayer group and does other work with the church. She believes that abortion is murder and is against the law of God and of the church and feels that it is wrong.

Because of the union's position, Mrs. MacLean does not want anything

to do with the union, she does not want the union to represent her and she does not want to support the union; she feels that if she supports the union that she is paying for the support of abortion.

Father John Gallagher, the Director of the Cardinal Carter Centre for Brothers testified on the applicant's behalf with respect to the position and teaching of the Roman Catholic church. Father Gallagher was well qualified to state the church's views. In summary he stated that the church's position is that abortion is wrong because it takes a human life and that Mrs. MacLean's position was consistent with the teaching of the Roman Catholic church.

The union also called witnesses who described the procedures utilized by the union in considering the abortion issue. The resolution adopted is as follows:

> "Whereas it should be the fundamental right of each woman to choose when and if she will bear children, and
>
> Whereas present Criminal Code restrictions affect the legality and availability of abortions, and highly organized campaigns are underway to further limit the right to choose and
>
> Whereas two-fifths of the population of Canada lives in communities not served by hospitals eligible to perform abortions, and
>
> Whereas there is not a safe and effective method of birth control for each woman,
>
> Be it resolved that OPSEU endorses a woman's freedom of choice by supporting the right of woman to full access to abortion,
>
> Be it further resolved that OPSEU demands the removal of abortion from the Criminal Code,
>
> Be it further resolved that OPSEU demands the free-standing medical clinics providing abortions fully covered by provincial medical plans be established.

After duly considering the evidence, it is our view that Mrs. MacLean is a devout Catholic, that she is sincere in her beliefs and that the only reason that she has for opposing payment of dues to the union is because of her religious beliefs which are dramatically opposed to the resolution adopted by the union. Mrs. MacLean, a once active trade unionist, is not opposed to trade unions and only seeks to divert her dues or contributions to a charity because she does not want her funds to be used to support an organization which takes a position on abortion contrary to her religious beliefs.

As the outset and before turning to the arguments, it is not necessary for this Tribunal to enter into the abortion pro-choice or pro-life debate. Our obligation under the Act extends only to ensuring that Mrs. MacLean's opposition to the payment of union dues is rooted in religion. The Act provides as follows:

> 16 (1) The parties to a collective agreement may provide for the payment by the employees of dues or contributions to the employee organization.
>
> (2) Where the Tribunal is satisfied that an employee because of his religious convictions or belief objects to paying dues or contributions to an employee organization, the Tribunal shall order that the provisions of the collective agreement pertaining thereto do not apply to such employee and that the employee is not required to pay dues or contributions to the employee organization, provided that amounts equivalent thereto are remitted by the employer to a charitable organization mutually agreed upon by the employee and the employee organization and failing such agreement then to such charitable organization registered as such under Part I of the Income Tax Act (Canada) as may be designated by the Tribunal.
>
> (3) No collective agreement shall contain a provision which would require, as a condition of employment, membership in the employee organization. R.S.O. 1980, C. 108, S. 16.

We are satisfied in that regard that her position is based on her religious beliefs and whether this Tribunal individually or collectively take the same or a different view of the matter is not relevant in these proceedings.

Counsel for the applicant submits that Mrs. MacLean is deeply religious and sincere in her beliefs, that the union's position is wrong and that because of those beliefs she objects to paying union dues. He argues that once that finding is made, Section 16 is mandatory and demands that the Tribunal "shall order ... that the employee is not required to pay dues or contributions to the employee organization".

Counsel for the union submits that the granting of the applicant an exemption would restrain the freedom of activity of trade unions to take positions on matters of public concern. He argues that Section 16 only protects persons who object to trade unions personally rather than a particular trade union, and that the kind of union activity which is objected to here is beyond the range of activities which Section 16 is designed to protect. The union also maintained that the legislation must be interpreted so as to be consistent with the civil liberties of all the members of the union including their freedom of speech and association.

The argument as presented, again throws into relief the conflict between majority rule and minority rights. The union as a collective is the exclusive bargaining agent for all employees in the bargaining unit and thus required to act on behalf of all the members of the unit. The principle of exclusive representation is an important element in our strategy of industrial relations since multiple representation would promote jurisdictional strife between competing

representatives and weaken the bargaining strength that currently exists where there is exclusive representation. However, exclusive representation necessarily involves majority rule and necessitates some restrictions of minority rights. Thus, for example, individuals are not able to bargain separately with the employer so as to deviate from the terms negotiated by the union and are required to accept representation from a trade union that may not be of their choice. The balances that are struck within the bargaining unit by the multitude of competing interests is merely an expression of majority rule and part of the democratic process that exists in many other facets of our society.

The mandatory payment of dues is equitable because all who share the benefits also share the costs of collective bargaining which includes the administration of the collective agreement, the processing of grievances and the costs of negotiations. Compulsory dues secures financial assistance for the union's efforts and thereby promotes industrial stability while eliminating "free riders" from resting on the contributions of others.

Trade unions have for many years been involved in political and social causes in the interests of their members. In representing working people they have become an effective voice for their members, counterbalancing the organized efforts of business, corporations, governments and others who represent competing interests. As well unions have become the effective voice for their members in areas that appear to be beyond the scope of collective bargaining. Thus unions have taken measures to defeat legislation which they consider detrimental to unions or to the general welfare of their membership. They have taken actions to implement or defeat industrial legislation involving worker safety and also they

have taken steps to support or defeat economic legislation which may injure its members. Recognition of the broad and legitimate interests of trade unions has been the subject of comment of others. Thus Archibald Cox has noted that:

> It is difficult, if not immpossible to separate the economic and political functions of labour unions. Right-to work laws affect union organization and collective bargaining. Legislation subjecting unions to the anti-trust laws or confining their scope to the employees of a single company would greatly weaken their bargaining power if it did not destroy them altogether ... Political action in these spheres of union interest is hardly more than incidental to the union's economic activities. A similar link exists even when a union takes political action upon a broader front.
> A. Cox, Law and the National Labour Policy 107 (1960)

To the same effect are the views of Justice Frankfurter (dissenting) in Continental Association of Machinists v. Street. 367 U.S. 740 at 814-815 (1961)

> When one runs down the detailed list of national and international problems on which the AFL-CIO speaks, it seems rather naive for a court to conclude - as did the trial court - that the union expenditures were "not reasonably necessary to collective bargaining or to maintaining the existence and position of said union defendants as effective bargaining agents." The notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labour on matters not immediately concerned with wages, hours, and conditions of employment. And this Court accepts briefs as amici from the AFL-CIO on issues that cannot be called industrial, in any circumscribed sense. It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labour.

Thus, in our view, it is futile to draw a line between matters of direct collective bargaining and social, political, or economic matters. Unions are the effective spokespersons for labour or for the members in all manner of matters affecting not only their general welfare but their working lives. Any distinction is without foundation and unions have a general interest in dealing with such matters without restriction. In more recent times unions have played a major role in such areas as industrial safety, economic legislation, human rights legislations, legislation affecting minorities, women, handicapped and injured workers. There is no reason to think that improvements in the life of union members should be confined to the collective agreement and not extended to legislation or social attitudes.

Once the broad range of union interests is accepted, it is apparent that individual members as a result of being compelled to pay union dues or contributions may, by paying such dues or contributions, also support causes they detest or which are contrary to their views or interests. When individuals object to government policy they are not permitted to withhold their taxes. However, in almost all other areas of society and in all of our other democratic and social institutions where individuals or minorities object to the views of the majority they are free to withdraw from the particular insitution without suffering excessive penalty or harm. But, the withdrawal of his or her dues or contributions to the union by an individual member of the bargaining unit may result in the loss of a person's job. That is a severe penalty and severe economic hardship. In many cases it renders illusory the democratic right not to support or finance views or projects with which one fundamentally disagrees.

To a limited extent the legislature of the province has attempted to balance majority and minority interest by enacting Section 16 which provides, that persons who have religious objections to trade unions may gain exemption from payment of union dues or contributions. The legislature, in a sense, has not permitted those persons to become free riders because they are not exempted from payment of dues but are required to pay an amount equivalent to union's dues to a charitable organization.

As the Ontario Labour Relations Board in discussing the competing interests in similar legislation under the Ontario Labour Relations Act stated in Anthony J. Vis v. The Hamilton Beverage Dispensers Union, Local 147 v. Sheraton Limited - Sheraton Cannaught Hotel (1972) OLRB Rep 249

> The merits of the issue have thus been decided by the Legislature. On balance it was opted for freedom of religion and it only remains for this Board to determine whether individuals comply with the legislation. This Board, and quite properly so, because the balance of freedoms in our democratic society is a matter for the legislature, is not given the authority under the statute to weigh the merits of the debate between freedom of association and freedom of religion. Our function is merely to determine whether an individual applicant comes within the meaning and intention of the statutory exemption.

When the legislation was originally enacted it was to alleviate the perceived plight of religious employees who appeared to be trapped in an organization which they opposed. Thus a compromise was struck in that religious persons were permitted to withdraw support but were still required to pay equivalent amounts to a charity. There was no personal financial benefit to those who withdrew financial support from a union.

Contrary to the views of the proponents of the legislation that many people were labouring under the harsh views of trade unions who were suppressing their religious views there has not been a significant rush to gain exemption from the alleged harsh yoke imposed by paying dues to a trade union. The strengths of unions have not been sapped by the relatively small number of applicants who have applied for exemption.

However as the legitimate area of trade union concerns has widened, so too has the area where individual concerns might be suppressed. Current experience suggests that perhaps a different balance must be struck. Thus persons who have gained exemption through deep religious convictions have not foresworn benefits gained by their trade union representatives in traditional areas of contract administration, negotiations and processing of grievances. There seems to be no reason why we should not have those who receive the benefits pay the costs, and not rest on the dues or contribution of others.

On the other hand the widening circle of trade union interests will no doubt extend the area of individual dissent. The threat of losing significant financial support by trespassing on views rooted in religious conviction may have the effect of silencing legitimate expressions of opinion by the majority and the withdrawal of an important voice in our democratic process on issues that are of significant and substantial concern to working people and members of the bargaining unit. In Abood v. Detroit Board of Education (1977) 431 U.S. 209, 95 LRRM 2411 (U.S. Sup Ct) Mr. Justice Stewart dealt with the competing interests as follows:

The appellants argue that they fall within the protection of these cases because they have been prohibited not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.

One of the principles underlying the Court's decision in Buckley v. Valeo, 424 U.S. 1, was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because "(m)aking a contribution ... enables like-minded persons to pool their resources in furtherance of common political goals," id., at 22, the Court reasoned that limitations upon the freedom to contribute "implicate fundamental First Amendment interests," id., at 23.

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See Elrod v. Burns, supra, at 356-357; Stanley v. Georgia, 394 U.S. 557, 565; Cantwell v. Connecticut, 310 U.S. 296, 303-304. And the freedom of belief is not incidental or secondary aspect of the First Amendment's protections:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters or opinion or force citizens to confess by word or act their faith herein." West Virginia Board of Education v. Barnette, 319 U.S. 624, 642.

These principles prohibit a State from compelling any individual to affirm his belief in God, Torcaso v. Watkins, 367 U.S. 488, or to associate with a political party, Elrod v. Burns, supra; see id., at 363-364, n. 17, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.

(3) We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or towards the advancement of other ideological causes not germane to its duties as collective bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those

ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

There will, of course, be difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.

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The court went on to discuss the remedy in the following manner:

In determining what remedy will be appropriate if the appellants prove their allegations, the objective must be to devise a way of preventing compupulsory subsidization of ideological activity by employees who object thereto without restricting the union's ability to require every employee to contribute to the cost of collective-bargaining activities. This task is simplified by the guidance to be had from prior decisions. In Street, supra, the plaintiffs had proved at trial that expenditures were being made for political purposes of various kinds, and the Court found those expenditures illegal under the Railway Labor Act. See pp. 9-10, supra. Moreover, in that case each plaintiff had "made known to the union representing his craft or class his dissent from the use of his money for political causes which he opposes." 367 U.S., at 750; see id., at 771. The Court found that "(i)n that curcumstance, the respective unions were without power to use payments thereafter tendered by them for such political causes." Ibid. Since, however, Hanson had established that the union-shop agreement was not unlawful as such, the Court held that to enjoin its enforcement would "(sweep) too broadly." Ibid. The Court also found that an injunction prohibiting the union from expending dues for political purposes would be inappropriate, not only because of the basic policy reflected in the Norris-La Guardia Act against enjoining labour unions, but also because those union members who do wish part of their dues to be used for political purposes have a right to associate to that end "without being silenced by the dissenters." Id., at 772-773.

After noting that "dissent is not to be presumed" and that only employees who have affirmatively made known to the union their opposition to political uses of their funds are entitled to relief, the Court sketched two possible remedies: first, "an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget," and second, restitution of a fraction of union dues paid equal to the fraction of total union expenditures that were made for political purposes opposed by the employee. 367 U.S. at 774-775.

> The Court again considered the remedial question in Brotherhood of Railway & Steamship Clerks v. Allen, 373 U.S. 113, 53 LRPM 2128. In that case employees who had refused to pay union-shop dues obtained injunctive relief in state court against enforcement of the union-shop agreement. The employees had not notified the Union prior to bringing the lawsuit of their opposition to political expenditures, and at trial, their testimony was principally that they opposed such expenditures, as a general matter. Id., at 118-119, n. 5. The Court held that the Employees had adequately established their cause of action by manifesting "opposition to any political expenditures by the union," id., at 118 (emphasis in original), and that the requirement in Street that dissent be affirmatively indicated was satisfied by the allegations in the complaint that was filed, id., at 118-119, and n. 6. The Court indicated again the appropriateness of the two remedies sketched in Street; reversed the judgment affirming issuance of the injunction; and remanded for determination of which expenditures were properly to be characterized as political and what percentage of total union expenditures they constituted.
>
> The Court in Allen described a "practical decree" that could properly be entered, providing for (1) the refund of a portion of the exacted funds in the proportion that union political expenditures bear to total union expenditures, and (2) the reduction of future exactions by the same proportion. Id., at 122. Recognizing the difficulties posed by judicial administration of such a remedy the Court also suggested that it would be highly desirable for unions to adopt a "voluntary plan by which dissenters would be afforded an internal union remedy." Ibid. This last suggestion is particularly relevant to the case at bar, for the Union has adopted such a plan since the commencement of this litigation.

In our view it was not the intent of the legislature in enacting Section 16 of CECBA given the multitude of views of its members, to censor or inhibit the trade union from speaking out on matters in which labour has an interest but which cannot be achieved through collective bargaining. The trade union must be able to speak out on a variety of subjects affecting its members without fear that employee members of the bargaining unit will withdraw all of their support including support for normal collective bargaining activities such as collective agreement administration, the processing of grievances and the costs of bargaining. On the other hand employees with strong religious convictions should not be compelled to subsidize ideological activity by the trade union which conflicts with their religious conviction or beliefs.

It is our view that the Act as drafted is capable of achieving the balance arrived at in the Abood case. It is our view that the term dues or contributions includes the whole of an employees' dues or contributions as well as a part, and where the legislation requires that the Tribunal grant exemption that we may do so with respect to that part of the dues or contributions that relates directly to the religious objection or belief while requiring the employee to contribute to the non-ideological collective bargaining matters which benefits the employee and to which the employee does not object.

Thus it is clear that the applicant who was a trade union activist does not object to the usual collective bargaining activities but really objects to the ideological activity. In these circumstances it is our view that the applicant be exempted from payment of the portion of her dues or contributions in the proportion that union ideological expenditures in promoting the pro-choice position is to the total union expenditures. The amounts so deducted or equivalent amounts shall be remitted by the employer to a charitable organization. The parties shall meet to determine both the extent of the deduction and to mutually agree upon the charitable organization. Failing an agreement on either matter the Tribunal may determine the amount as well as designate the appropriate charitable organization pursuant to Section 16. The amounts deducted shall be retroactive to the date of the filing of the application.

DATED at Toronto, Ontario this 18th day of December, 1985.

Owen B. Shime, Chairman
Labour Relations Tribunal

IT/0014/84-2

Crown Employees Collective Bargaining Act, R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0014/84

BETWEEN: - Mrs. Rose Marie MacLean

Applicant,

- and -

Ontario Public Service Employees Union

Respondent Employee Organization,

- and -

Ontario Ministry of Community and Social Services

Respondent Employer or Agency of the Employer.

BEFORE: O. B. Shime, Chairman
B. Walsh, Member
L. Binder, Member

FOR THE APPLICANT: N. A Keith
Counsel
Mathews, Dinsdale & Clark
Barristers & Solicitors

FOR THE RESPONDENT EMPLOYEE ORGANIZATION: P. Cavalluzzo
Counsel
Cavalluzzo, Hayes & Lennon
Barristers & Solicitors

FOR THE RESPONDENT EMPLOYER: No Appearances

HEARING: June 19, 1984

SUPPLEMENTARY DECISION

On the 18th day of December, 1985, this Tribunal decided that Mrs. R. M. MacLean who is a devout member of the Roman Catholic Church was entitled to an exemption from payment of a portion of her dues or contributions to the union because of her religious beliefs. Mrs. MacLean had sought exemption from the payment of dues or contributions to the union because of the position taken by the union concerning the issue of pro-choice. This Tribunal has exempted her from payment of that portion of her dues or contributions in the same proportion that union expenditures in promoting the pro-choice position is to the total union expenditures.

Counsel for Mrs. MacLean now asks us to reconsider our decision on the basis that the decision was contrary to section 16 (2). In particular the applicant relies on the decision of this Tribunal in the Forer case, which was a case where a member of the Jewish religion objected to the unions support of the resolution of the Ontario Federation of Labour which has supported the P.L.O. Mr. Forer was granted complete exemption. That matter subsequently proceeded to the Divisional Court and then to the Ontario Court of Appeal where the decision of the Tribunal which had been overruled by the Divisional Court was reinstated.

At the outset it is important to note that the arguments in the Forer case were very different from the arguments presented in the instant case. Mr. Forer was not represented by counsel and took the simple view that his position

was religious while the union argued (i) that Mr. Forer's views were not religious and (ii) that the Ontario Federation of Labour resolution which had been supported by the union and which had formed the basis for Mr. Forer's objections had been nullified by a resolution of the Canadian Labour Congress.

In the instant case both parties made very extensive submissions which differed in kind and quality from the submissions made in the Forer case; many of the decided cases were submitted and discussed. More significantly, Mr. Cavalluzzo argued the importance of free speech for members of the union, the need to accommodate the civil liberties interest of the members and also the impact of the Charter of Rights on the issue. The issues that were argued in this case were discussed in our reasons at some length in consideration of the extensive and able arguments that were made by counsel for both parties. But we note, that many of the issues raised and argued, were not at all raised or argued in the Forer case.

While the Forer case proceeded in the courts this Tribunal reserved its decision in the instant case on the basis that the courts might discuss and expand on the manner in which this Tribunal should deal with applications for religious exemption. Mrs. MacLean suffered no prejudice because of the delay, since, in our decision we granted her exemption, retroactive to the date of the filing of the application.

This is a request for reconsideration and our obligation under section 39 of the Act is to reconsider any decision and vary or revoke it if the Tribunal "considers it adviseable to do so". In our view the very extensive and thoughtful arguments made were considered by the Tribunal in the original decision and the

application and interpretation of section 16 (2) Act were also considered. Accordingly there is nothing in the request for reconsideration that would cause this Tribunal to depart from its earlier decision and the request for reconsideration is dismissed.

DATED in Toronto, Ontario this 25th day of July, 1986.

Owen B. Shime
For the Tribunal

T/0019/84-1

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL
T/19/84

BETWEEN: Ontario Public Service Employees Union

Applicant

- And -

The Crown in Right of Ontario

Respondent

BEFORE: O. B. Shime, Q. C., Chairman and
J. H. McGivney, Q. C., Member
E. C. Witthames, Member

APPEARANCES AT THE HEARING:

C. Paliare, Counsel & Others,
for the Union
C. G. Riggs, Q. C., Counsel & Others
for the Employer

DATE OF HEARING: September 6, 1984

This is an application pursuant to section 40 (2) of the Crown Employees Collective Bargaining Act (CECBA) to determine whether certain proposals put forth by the union to the employer in the course of bargaining come within the scope of collective bargaining under the Act.

The difference between the parties arises from the apparent conflict between section 7 of the Act which defines the scope for bargaining and section 18 which eliminates certain management functions from bargaining. The issues raised by the parties are not foreign to this Tribunal which dealt with similar differences between the parties in 1982. In a decision dated May 17, 1982, this Tribunal dealt with the ostensible conflict between section 7 and section 18 as follows:

> While there are issues that fall clearly within either Section 7 or 18 it is readily apparent from the proceedings in this matter that many issues are capable of being interpreted as falling under both sections. The dilemma facing the Tribunal is to determine under which heading a particular proposal falls. That dilemma may be illustrated by one of the proposals put forth by the Union which it alleges is a safety matter. There is nothing in the Act which prohibits bargaining about safety. However the safety proposal provides that no employee will be required to work alone in a mental retardation, psychiatric or correctional facility. The employer resists the proposal on the basis that the union has infringed the employer's exclusive right to determine complement. Since the proposal clearly involves numbers of employees it is obviously capable of being interpreted in the manner suggested by the union and in the manner suggested by the employer. How then is this Tribunal to resolve the issue?
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> There is no reason why the two sections of the Act cannot stand together. There are many instances where the law had resolved what appears to be conflicting statutory provisions. See e.g. Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association (1975) 8 O.R. (2d) 65. In order to determine under what section of the Act a particular proposal falls one must examine the proposal

> objectively in order to determine the basic nature and effect of the proposal. If after examination the proposal may reasonably be considered to fall under Section 7 it is permissible subject for bargaining notwithstanding that it may touch on matters that fall within Section 18. The converse is also true; thus if after examination, the nature and effect of the proposal are such that it may reasonably be considered to fall within Section 18 it is a prohibited subject for bargaining notwithstanding that it may touch on matters that fall under Section 7. The difficult situation, of course, is in those cases where a proposal may appear to fall equally within both Sections.

Counsel for the employer suggests that if there is any difficulty in construing the language of the proposals they should be disallowed. We do not think that these matters can be resolved so readily. Very often a gloss may be given to language or it may be interpreted in ways that the draftsman never intended. To engage in a process that disallows all proposals, which seem or appear to involve some conflict or difference would not service the parties. To send such a proposal back to the party drafting it and then to have it return to the Tribunal with the possibility of further disallowance and return would frustrate the bargaining process and in our view would not be conducive to good labour relations. We see no reason to depart from the basic test or procedure suggested by our decision in 1982 which permits the tribunal in the first instance to determine the basic nature and effect of the proposal and then allows the board of arbitration to have a second look at the proposal after leaving more extensive submissions and perhaps evidence. In addition as we indicated in our 1982 decision, the matter may be referred back to the Tribunal by the

arbitration board or the parties. That system contains a number of safeguards which hopefully would discover any improper proposals but has the virtue of allowing the bargaining and arbitration process to continue without the frustration of disallowance and remission to the draftsman until the matter is free of any ambiguity.

That is not to say that there are not situations where the language of the proposal is uncertain or where a concept is placed before the Tribunal where there is a clear possiblity of two or more interpretations. Where the language is patently ambiguous, the method of resolving the matter must be against those drafting the proposal and the proposal or concept will be disallowed and remitted. This, hopefully, will ensure that imprecise language is not presented to the arbitration board and will avoid further disputes and unnecessary procedures.

We are also of the view that there are different levels of ambiguity. Where the proposal is clearly ambiguous it is in order to remit the matter. However, there are lesser levels of ambiguity or differences between the parties because of a particular gloss that one of them has put on the matter that may be better clarified by discussion between the parties which enables them to reach an understanding as to the purpose and intent of the proposal. A mere difference in interpretation does not mean the proposal is ambiguous. In some of these situations, the concerns may be resolved by a specific undertaking or by the Tribunal noting and recording

the proper intent of the proposal. That process would clarify any misunderstanding and save further applications arising from remitting the matter.

And finally, the Tribunal has no desire to become involved in the drafting process. However, where some proposals are improper in part, or there is a word or phrase which causes us some concern, rather than remit we may allow the proposal to proceed if the offending word or phrase is deleted.

The various proposals are as follows:

Proposal

1. Article 24, Job Security

(a) Amend to provide that employees will be retained in the face of redundancies with the employer retraining employees affected by technological change, re-organization or other surplus-producing situations.

(b) New article to provide that there will be no contracting out of work performed by members of the bargaining unit where there are employees doing the work or who can be retrained to do the work in question.

(d) New language regarding technological change to provide for the way in which it is to be introduced; that there be no "red-circling" or demotions as a result of inability to operate high technology equipment; no minimum training to reach machine production specifications; no monitoring of employees via equipment; production quotas to be negotiated.

4. Pensions

The Union proposes that the Employer make a joint approach to Government to make the Superannuation Plan negotiable.

7. Article 7, Hours of Work

(b) Add new article to provide that the employer will not place employees on a shift which has not been mutually agreed upon by management and the union.

8. Article 46, Vacations

(b) Add new article to provide for a joint study of pre- and post-retirement matters such as pre-retirement leave, financial advice, counselling and related subjects.

11. Article 18, Health & Safety & Video Display Terminals

(a) Add new language to provide that no employee shall be required to work alone at any time on a ward, cellblock, in a cottage or facility for the developmentally handicapped or psychiatric patients, nor in a reform institution, nor drive an ambulance or answer ambulance calls alone, or work alone at the central switchboard.

(b) (Article 18.5) Add: "Employer shall provide adjustable furniture for users of VDTs and negotiate increased safety features on new equipment, ten minutes full break to reduce exposure from machines, the right to ergonomically-designed chairs and desks providing proper pack support and fitted paper stands to reduce eye strain, and proper ventilation/air cleaning to remove smoke and dust and other testing necessary.

(c) Protective shields shall be installed on all VDT machines now in use and not provided with such equipment, and all new VDT machines (or the like machines) shall be shielded before introduction of such equipment into the workplace.

(d) All machines currently in use shall be tested yearly and so marked, indicating the date of last testing and any new machines introduced into the workplace shall be tested by a committee of joint and equal Union/Management membership, before being put into operation and annually thereafter and so marked.

14. New Article

Add new article to provide for sexual harassment and similar matters to be dealt with through a joint affirmative action committee.

16. Unresolved Local & Ministry Items

Ministry of Health

(a) Add language to provide for staffing improvements and methods of adding new male staff in situations where security demands it.

Ministry of Government Services

(d) Negotiate joint Union/Management Committee to allocate funds and assign employees to receive technical and work-related training.

Ministry of Community and Social Services

(a) Language to provide for time off with pay and without loss of credits for a member of all closure committees in order to staff the union's closure office on a full-time basis during the period before, during and after the closure dates.

(h) Work plans/implementation plans to be provided to the Local/Ministry team.

(i) Copies of studies undertaken by private agencies or individuals at public expense and which affect work organization in any way to be provided to the union.

(m) Decision-makers from management to be present at Employee Relations Committees at the level of Deputy Minister or Assistant Deputy Minister.

Ministry of Labour

We propose that in the Ministry of Labour ministry level agreement the words "Any matter contained in the Manual of Administration, Volumes 1 and 2 and the Supplement of Volume 2", a proviso which management seeks to add to the list of items excluded from negotiation at the local or ministry level, be dropped.

Ministry of Revenue

> Language to provide that employees in all offices of the Ministry will be able to choose between or among the available start and finish times in the Ministry.

We now turn to the individual proposals.

The employer claims that the proposed Article 24(a) removes the authority of the Deputy Minister under Section 22 (4) of the Public Service Act to release employees. That section provides as follows:

> 22(4) a Deputy Minister may release from employment in accordance with the regulations any public servant where he considers it necessary by reason of shortage of work or funds or the abolition of a position or other material change in organization. The employer also submits that training and development is an exclusive management function under Section 18 of the Act.

The union asserts that the proposal concerns job security and falls within the concept of "lay-off" which is a permissible head for bargaining under Section 7 of the Act.

In the Tribunal's decision of November 16, 1983 an issue arose concerning Section 8(1) of the Public Service Act and the right of the Minister or his/her designee to reappoint a person to the unclassified service. After reviewing the decided cases in similar situations concerning the right to bargain where a particular statutory discretion existed, we determined that there was no repugnancy between the powers granted to the Minister and his/her designee and the right to bargain collectively. For those very same reasons we find that there is no repugnancy between Section 22(4) of the Public Service Act which grants the Deputy Minister

the discretion to release public servants from employment and the right of the union which flows from subsequent legislation to bargain about lay-off. The objections to the proposals therefore, cannot succeed on that ground.

In a similar vein, this Tribunal has dealt with the second objection raised by the employer concerning its argument that training and development are exclusive management functions. First the clause deals prima facie with employees affected by "redundancies" ie., "technological change, re-organization or other suplus producing situations". The union's proposal seeks to retrain those who may be laid off as a result of these specified types of situations. Clearly the union is entitled to bargain about lay-off and clearly the union's position is in line with similar proposals and even provisions in collective agreements which seek to blunt the harsh edge of unemployment through lay-off. In our view the nature and thrust of the proposal is to enhance job security and it is allowed.

Article 24(b) is a no contracting out provision. The employer submits that this provision infringes the employer's right "to determine organization" as well as "work methods and procedures" and "complement" within the meaning of section 18.

The union contends that the phrase "contracting out" is a common industrial relations term and if the legislature had intended contracting out to fall within the prohibited area it would have done so in specific terms.

It is true that contracting out is a well known term; however, contracting out is a method whereby an employer may organize its work and its work force. Thus the term appears to fall well within the concept of organization.

The government as an employer is called upon to respond to the needs of the community in many different ways. Also it is answerable or acccountable for the spending of public funds. It, thus, must be able to respond to community pressures having to do with program as well as funding. To this end, the legislature has placed the concept of organization, complement work methods and procedure within the exclusive function of the employer.

It is also significant that many unions have sought to negotiate or have negotiated prohibitions against contracting out as a method of retaining work for the bargaining unit and hence jobs, for their members. Thus negotiation prohibiting contracting out is a method which avoids job loss while at the same time restricting and limiting the employer's organization of the work force and work methods.

In part this proposal is like the previous proposal which deals with employees who are faced with "lay-off" once the employer has made its decision. It is concerned with "employees doing the work or who can be retrained". The proposal also prohibits contracting out, which infringes the employer's exclusive functions under section 18, while it seeks to prevent the lay-off of employees who may be laid off as a result of the contracting out. This appears to be one of those proposals referred to in our decision in 1982 that falls equally within both sections 7 and 18. Accordingly, the proposal is allowed but only to the extent that it seeks to mitigate the effects of contracting out on employees.

Article 24(d) of the union's proposals is of some concern because it has not been specifically formulated and in addition contains a number of concepts. We will attempt to deal with them separately. First the union proposes "new language regarding technological change to provide for the way it is to be introduced". The employer complains that this clause infringes its right under Section 18 of the Act to determine work methods and procedures. The union claims that if the legislature had intended to prohibit bargaining about technological changes, it would have done so in more precise terms. The union says that this item also concerns redundancy and lay-off.

The difficulty with this proposal is that it is too imprecise. As we indicated at the hearing a determination as to whether a proposal will be allowed or disallowed may depend on the language. There is often a fine line to be drawn in these matters and the precision of the language is to be weighed in the balance. Accordingly it is our view that this portion of the clause be remitted to the union in order that appropriate and more precise language be drafted so as to better embody its views. Once redrafted it may be submitted for further consideration. In this regard we will entertain written submissions from the parties if necessary so as to avoid the necessity of a further hearing.

The next portion of Article 24(d) concerns red circling and demotions and since there is no objection to that portion of the proposed article it is allowed.

The third portion of the article provides that there should be "no minimum training to reach machine production specifications". The employer contends that the proposed article is ambiguous. The employer has no objection if the article is concerned with rates of pay, but it is concerned that it might deal with "training" which is an exclusive function of the employer under section 18.

The union submits that this matter concerns rates of pay and explained its position thoroughly at the hearing.

The difficulty with this item is that it is drafted in such a manner that it immediately raises a red flag. Where the union uses terminology that is the same as that used by the legislature to describe the exclusive functions of the employer, it should expect some resistance from the employer. The language of the clause could be better drafted so as to resolve any ambiguity and accordingly is remitted to the union on the same basis as the previous item.

The fourth part of the proposed article concerns the "monitoring of employees via equipment". This matter was dealt with in the decision of the Tribunal on May 3, 1982 and we see no reason to depart from our earlier decision.

The remainder of the article is concerned with production quotas and since there is no objection, the proposal is allowed.

Pensions

The union has proposed a joint approach by the employer and the union to make the superannuation plan negotiable. Superannuation under article 18 1(b) is one of those matters that is "subject to review by the employer with the bargainning agent" but it is not to "be the subject of collective bargainning nor come within the jurisdiction of the board". While the proposal is harmless on its face, the act is quite clear -

superannuation cannot be the subject of collective bargainning at all and it is "not within the jurisdiction of a board" which in our view includes a board of arbitration.

If the employer refuses to review the governing principles of superannuation with the union, then the union has other remedies - but those remedies are not to be in a collective agreement. The act is clear and the proposal is disallowed.

Article 7, Hours of Work

The next proposal concerns shift work. The employer contends that if the article is concerned with shift premiums it has no objection but if it is concerned with shift preferences, there is an objection. The union assured the Tribunal that the proposed article is concerned with abuses or potential abuses of the existing article which provides shift premiums.

Again the proposal is not in the form of precise language. However to avoid repeated applications on this proposal we are prepared to allow the proposal based on the union's submissions that the article is concerned with abuse of shift premium. This is a matter that might have warranted some discussion between the parties.

Article 46, Vacations

The next proposal dealing with vacations falls into the same category. Again some discussions between the parties might have avoided the difficulty. The union assured the Tribunal that any post retirement reference was to current employees and on that basis the proposed article is allowed.

Article 18, Health and Safety and Video Display Terminals

The union has made a number of proposals, under this article that are objected to by the employer.

The first proposal concerns employees working alone. There is some doubt thrown on the article because of the reference to working alone at the central switchboard. On balance we are not satisfied with the union's submissions in that regard and the proposal is allowed except that the phrase "or work alone at the central switchboard" is to be deleted.

The next proposal (article 18.5) dealing with equipment is objected to on the basis that it infringes the employer's right to determine the "kinds and locations of equipment" under article 18. There is absolutely nothing in the proposal that affects the employer's right to

determine location and any objection in that regard has no basis. As to kinds of equipment, it appears that the nature and thrust of the proposal is to improve the safety and health of the employees by providing adjunct support to any basic equipment that the employer might select. The proposal is allowed.

The proposed article 18(c) is clearly a safety matter and is allowed as is the proposed article (d). Insofar as article 18 (d) is concerned it imposes no limit on location nor does it affect the employer's right to determine the "kinds of equipment" it merely ensures that the selected equipment shall be tested for safety purposes.

New Article

The next matter deals with a joint affirmative action committee to deal with "sexual harassment and similar matters". The employer submits that the joint action committee would be set up to respond to improper conduct and that any likely response would be disciplinary in nature and contrary to section 28. The employer also objects to the term "similar matters."

The union submits that the committee is to give employees some recourse where they are sexually harassed and that complaints should be brought to another person about harassment particulary where the offender may be the immediate supervisor. The union also wants to ensure that the employer does not violate the duty imposed upon it by the Human Rights Code.

In our view, the reference to similar matters as suggested by the employer is vague and ambiguous and it should be deleted from the proposal. Again this is a proposal that ought to have been more thoroughly discussed. Obviously there are areas of discussion about sexual harassment that are legitimate eg. education and which do not infringe on the employer's rights to discipline, dismiss or suspend. Accordingly it is our view that the proposal should be allowed on the clear understanding that the proposal is limited in scope and that any committee established does not infringe on the employer's right to discipline, dismiss and suspend.

The next series of proposals deal with specific Ministry matters.

Ministry of Health

This item is objected to on the basis that it infringes the employer's right to determine complement. However, the proposal is

clearly limited to "situations where security demands it" and is a safety matter and accordingly is allowed.

Ministry of Government Services

This proposal is for a joint union-management committee to allocate funds and assign employees to receive technical and work related training. We agree with the employer's submissions that the proposal infringes the employer's right to determine assignment under article 18(a) and its right to determine training and development under article 18(b). As drafted the proposal is not limited to consultation and is disallowed.

Ministry of Community & Social Services

There is no objection to part (a) of the proposal and it is allowed. The next two items require work plans and implementation plans to be provided to the local Ministry Team and that copies of all studies affecting work organization be provided to the union.

The union is concerned with closures and cut back and seeks to bargain about disclosure by the ministry concerning its plans, time table and what is going to happen to members of the bargaining unit who are going to be displaced.

The employer submits that the proposal affects its right to "manage" in the broadest sense and that the proposals are aimed at the employer's right to determine organization.

Having regard to the submissions, it is our view that the proposals, as drafted, are very broad and all encompassing. They do not properly reflect the union's concerns as they have been articulated in its submissions. The broadness and scope of the language clearly touch on all matters of potential organization and could indeed affect complement. On balance, while we recognize the legitimacy of the union's claim, it is our view that the proposals as drafted go beyond the concerns expressed and have the potential to seriously affect the employer's rights under section 18. The proposals, as such, may be "wolf in sheep's clothing proposals" and for these reasons they are remitted back to the union.

The last proposal that the Deputy Minister or Assistant Deputy Minister be present at certain meetings, clearly infringes the employer's right to organize its affairs as well as to assign its management personnel as it sees fit. While we sympathize with the union's desire to communicate with responsible persons who are capable of making decisions, it cannot command the employer's organization or management personnel. There is no doubt that the ability to communicate in a responsible way is important but that concept should be dealt with in a manner and in language other than that used. The proposal is disallowed.

Ministry of Labour

The objection to the proposal has been withdrawn and the proposal is allowed.

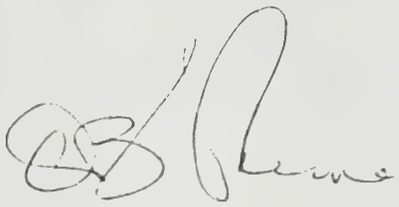
Ministry of Revenue

The union proposal concerns hours of work. The employer does not object to such a proposal but suggests, as drafted, the proposal could offend the employer's right to determine organization under section 28 (a).

The Tribunal notes the union's assurances that this is a provision dealing with hours of work so as to permit employees to choose from available start and finish times as determined by the employer and does not intend to allow employees to move or transfer at will. Subject to that understanding the proposal is allowed.

The Tribunal also notes the agreement of the parties and the concurrence of the Tribunal that the constitutional argument not be proceeded with at this time and such argument is adjourned sine die.

DATED at Toronto, this 4th day of October, 1984.



O. B. Shime, Q.C.
For the Majority

ONTARIO PUBLIC SERVICE
LABOUR RELATIONS TRIBUNAL

CASE T/19/84

-

THE CROWN IN RIGHT OF ONTARIO

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

PARTIAL DISSENT

Having been given the opportunity to study the Chairman's decision in this matter and though substantially agreeing with his opening opinions and his quotes from the May 17, 1982 decision, this member finds it necessary to oppose the learned chairman on two of the proposal decisions, namely; Pensions, and Ministry of Community and Social Services - Proposal (m).

PENSIONS

UNION PROPOSAL: "The Union proposes that the employer make a joint approach to government to make the superannuation plan negotiable".

It appears the employers objection was to the use of the word "superannuation". When it was made clear by the Union that they were not referring to persons already on retirement , there seemed to be some form of acceptance by the employer. However notwithstanding that, the union is asking for the establishment of a joint committee on pensions.

Phraseology is our problem here. The employer seemed, to this member, to have no objection to a joint committee approach to government but leans on the word "superannuation" as an estoppel. The Tribunal would be remiss in its duties if it ever turned down a joint committee approach to anything. To not allow it because of the use of one word makes a complete mockery of bargaining. After all is said and done the whole bargaining process is by committee. This member would allow the joint committee request go to the arbitrator leaving the arbitrator to perhaps decide terms of reference for any such committee.

MINISTRY OF COMMUNITY AND
SOCIAL SERVICES - PROPOSAL (m)

UNION PROPOSAL: "Decision-makers from management to be present at LRCs at the level of Deputy Minister or Assistant Deputy Minister".

The employer's objection that this falls within their right to manage. This member agrees with that statement but deplores the need for it. So many times in the bargaining process there is a frustration because one can't meet the person who has the real power to make a decision or deal. In government, this must be prolific in nature because of the number of departments and various levels of authority. The Tribunal at this point must look narrowly to Section 18 and compare the right to manage with the broader meaning of "processing grievances" in Section 7 and allow the matter to go to the arbitrator. To give another outside party, the arbitrator, the opportunity to seek a solution to this all important subject in today's employer/employee relationship - "COMMUNICATE".

Respectfully submitted,

EDWARD C. WITTHAMES
(Member)

T/0019/84-2

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/19/84

BETWEEN: Ontario Public Service Employees Union

Applicant

- And -

The Crown in Right of Ontario

Respondent

BEFORE: O.B. Shime, Q.C., Chairman
J. H. McGivney, Q.C., Member
E. C. Witthames, Member

APPEARANCES AT THE HEARING: C. Paliare, Counsel & Others, for the Union
C. G. Riggs, Q.C., Counsel & Others for the Employer

DATE OF HEARING: September 6, 1984

SUPPLEMENTARY DETERMINATION

In a decision dated October 4, 1984, this Tribunal determined whether a number of proposals put forth by the union come within the scope of collective bargaining under the Act. The proposals were dealt with in a number of ways: some were allowed, some disallowed and others were remitted or referred back to the union for redrafting and further consideration by the Tribunal should it be necessary.

The parties at the time were proceeding with a hearing before an interest Board of Arbitration. In a letter to the Tribunal dated December 11,1984, the Employer submitted that five of the union's proposals that had been submitted to the Arbitration Board did not come within the scope of collective bargaining under the Act. The Tribunal while permitting the Board of Arbitration to proceed requested written argument from the parties. The Tribunal has indicated earlier that although a Board of Arbitration may decide whether certain matters come within the Act, that the Tribunal is the body primarily responsible for deciding matters that fall within section 40 (2) of the Act.

There may be some instances where the Tribunal may permit matters to be determined by a Board of Arbitration and reserve its decision, but given the course of proceedings in this matter and the stage that the Arbitration Board is at in considering the submissions, we see no reason to withold our determination.

For convenience the submissions of the parties which were set out in writing to the Tribunal are as follows:

In a letter from C. G. Riggs, Hicks Morley Hamilton Stewart Storie, dated December 11, 1984, the employer made the following submissions:

> "On behalf of the Employer we are setting out herewith our submissions on the arbitrability of certain proposals filed by the union with Professor Kenneth Swan at the interest arbitration hearing. In our view, five of the union proposals do not properly come within the scope of collective bargaining under the Crown Employees Collective Bargaining Act. These proposals and our arguments in relation to them follow:
>
> (1) "Article 24.3 (New) Where a vacancy such as described in Articles 24.2.1. and 24.2.2 does not exist at the time an employee is identified as surplus, the employer will retain such an employee on staff and provide him with retraining without cost to the employee, during his working hours, and with no loss of pay or credits until such time as a vacancy for which he qualifies in accordance with Articles 24.2.1 and 24.2.2 becomes available".
>
> The thrust of the union's proposal is to prevent layoffs entirely and to require the employer to continue payment to an employee indefinitely until another job becomes available. This proposal goes beyond the original union proposal found on page 4 of the Tribunal's decision dated October 4, 1984.
>
> In our submission the total prohibition against layoffs found in the current proposal involves a clear repugnancy with the provisions of section 22 (4) of the Public Service Act. The effect of the proposal would be to entirely exclude and make meaningless the exercise of discretion by the Deputy Minister under that section.
>
> (2) "Article 24.5 (New) Contracting Out - In order to provide job security for the members of the bargaining unit, the Employer agrees that work or services presently performed or hereafter assigned to the bargaining unit shall not be sub-contracted, transferred, leased, assigned, or conveyed, in whole or in part, to any other company, plant, facility, person or non-bargaining unit employee."
>
> Again the thrust of the union's proposal is to establish a complete prohibition on contracting out or the assignment of work by the employer to non-bargaining unit employees. The Tribunal held in its

October 1984 decision that the union proposal on contracting out was only permissible "to the extent that it seeks to mitigate the effects of contracting out on employees" (page 10). The current union proposal does not involve merely a mitigation of the effect of contracting out but completely prohibits contracting out. As the Tribunal noted on page 9 of its October award, such a proposal is offensive to the concept of organization, complement, work methods and procedure which lies within the exclusive function of the employer under section 18 of the Act.

(3) "Technological Change (New) At least six (6) months prior to the introduction of new or modified equipment and/or associated changes in methods of operation which may result in the identification of employees as surplus and consequent retraining or relocation in accordance with Articles 24.2.1 and 24.2.2, the Employer shall advise the union of such proposed introduction and discuss the proposed change with a view to avoiding or minimizing its adverse effects."

The Tribunal indicated in its October decision that it wanted a new proposal because the union's proposal on this point was "too imprecise" (page 11). The new union language imposes in effect a comprehensive six month limitation on any new equipment which may have negative impact on employees. With respect, this goes far beyond any legitimate claims to job security and offends the provisions on work methods and procedures set out in the Act. What the proposal does in practice is to impede the introduction of any technology however significant its impact and however important its timing.

(4) "1.4 Where new or modified equipment is introduced by the Employer in accordance with this article, no minimum training period shall be set by which an employee must reach the accreditation level set for the equipment. The training period shall continue until all affected employees have reached the required standard. Any salary increase arising from the new skills so acquired shall be paid to the employee as soon as he reaches the required standard."

Again the Tribunal remitted the original union proposal for redrafting (page 12). Its earlier proposal was, according to the union, concerned with rates of pay and not with training. But this proposal squarely addresses issues of training in terms of minimum periods of training and the length of the training period, and is inconsistent with the authority vested in the employer under section 18 (1) (b) with respect to training and development as well as appraisal.

(5) "1.5 The parties agree that, in order to retain a humane and harmonious workplace, any mechanical, electronic or other non-human monitoring capability of new or modified equipment already in place or introduced into the workplace in accordance with this article shall be

rendered inoperable and shall not be used in any way by the employer to evaluate or monitor the employees work. It is expressly agreed that any necessary supervision will be conducted by the employee's assigned, human supervisor."

This proposal offends the Employer's authority over appraisals and over work methods and procedures. Moreover, the Tribunal previously dealt with this issue in its decision dated May 3, 1982 on proposal 3 (d) (iii) on page 2 and more extensively at page 9 of its decision dated May 17, 1982. In our submission the proposal remains contrary to the legislation.

All of which is respectfully submitted."

The union responded in a letter from C. G. Paliare, Gowling & Henderson, dated December 21, 1984:

"On behalf of the Union we have been asked to respond to Mr. Riggs' letter of December 11,1984, with respect to the above-noted matter. I will deal with each of the items in the order set out in that letter:

1. This item clearly deals with job security matters and, more particularly, with the notion of re-training. This proposal is within the ambit of permissible bargaining under the Act and should be decided on its merits by the Swan Board of Arbitration.

2. Again, the proposal related to contracting out has its foundation in job security as is evident from the opening words of proposed Article 24.5. Obviously, one of the most serious threats to job security would involve the contracting out of work or services. The proposed article merely addresses this problem and should be decided by the Swan Board of Arbitration.

3. The employer has not pointed to any provision of the Act to substantiate its claim that this proposal is improper since, obviously, there is no such provision which would prohibit this particular clause. As with the other proposals the main complaint of the employer is with the merits of the proposal which should be decided by the Swan Board.

4. The legislation does not preclude this proposal from being negotiated or arbitrated since the purpose of the clause was aimed at job and wage security where the employer introduces new or modified equipment.

The proposal in no way attempts to impose any obligation on the employer to train nor does it advise the employer the way in which the employees are to be trained.

5. This proposal has as its purpose the health and safety of the employees. The Union is concerned about the potential psychological and physiological harm that may be imposed upon employees where they are to be monitored by mechanical, electronic or other non-human monitoring devices. The Union clearly has the right to bargain about health and safety matters and has a legitimate concern that employees not suffer from the potentially harmful effects of electronic monitoring. The proposal in no way takes away from the employer's right to appraise employees.

The work "appraisal" has a subjective connotation and is defined by Webster's dictionary as "an act or instance of appraising". "Appraise" is defined as meaning "to evaluate the worth, significance or status of ...". Thus, the appraising of an employee is a subjective, evaluating function.

On the other hand, electronic monitoring deals with a separate and totally distinct notion from appraisals, having nothing to do with subjective evaluations. Accordingly, this is a matter which is not prohibited under the legislation and should be decided by the Swan Board."

The employer replied in a letter from C. G. Riggs, Hicks Morley Hamilton Stewart Storie, dated January 14, 1985:

"We acknowledge receipt of a copy of the Registrar's letter dated January 9, 1985 in this matter enclosing a copy of the union's response to the employer's submission. Our views were set out in the letter to the Tribunal dated December 11,1984. Following our review of the union's submission, we would add the following brief comments.

With respect to proposal (1), the union's submission ignores the point that its proposal prevents layoffs entirely. Similarly, it ignores the fact in proposal (2) that there is a complete prohibition on contracting out. For the reasons contained in our original submission neither of these positions is legally tenable. With respect to proposal (3), contrary to the union's assertions, the proposal is contrary to the exclusive authority of the employer over "work methods and procedures" in section 18(1)(a) of the Act. As to proposal (4), it clearly deals with issues of training in terms of minimum periods of training and the length of the training period. Finally, as to proposal (5), the union's

> submission does not address the fact that this issue has already been dealt with adversely to its position by the Tribunal in previous decisions.
>
> All of which is respectfuly submitted."

After considering the submissions of the parties, it is our view that the nature and effect of the proposed Article 24.3 is to prohibit lay-offs entirely. There is no doubt that the union is entitled to bargain about lay-off pursuant to section 7 of the Act. However, it still lies with the employer to determine complement and organization under section 18 of the Act. As well, there is an element of discretion, as the employer has pointed out, under section 22.4 of the Public Service Act. The union's proposal completely eliminates the jurisdiction of the employer by, in effect, prohibiting lay-offs entirely. The proposal is too extreme and is therefore disallowed.

Our view is the same with respect to Article 24.5. In our determination of October 4, 1984 dealing with the same issue we sated as follows at Page 8:

> Article 24 (b) is a no contracting out provision. The employer submits that this provision infringes the employer's right "to determine organization" as well as "work methods and procedures" and "complement" within the meaning of section 18.
>
> The union contends that the phrase "contracting out" is a common industrial relations term and if the legislature had intended contracting out to fall within the prohibited area it would have done so in specific terms.
>
> It is true that contracting out is a well know term; however, contracting out is a method whereby an employer may organize its work and its work force. Thus the term appears to fall well within the concept of organization.

> The government as an employer is called upon to respond to the needs of the community in many different ways. Also it is answerable or accountable for the spending of public funds. It, thus, must be able to respond to community pressures having to do with program as well as funding. To this end, the legislature has placed the concept of organization, complement work methods and procedure within the exclusive function of the employer.
>
> It is also significant that many unions have sought to negotiate or have negotiated prohibitions against contracting out as a method of retaining work for the bargaining unit and hence jobs, for their members. Thus negotiation prohibiting contracting out is a method which avoids job loss while at the same time restricting and limiting the employer's organization of the work force and work methods.
>
> In part this proposal is like the previous proposal which deals with employees who are faced with "lay-off" once the employer has made its decision. It is concerned with "employees doing the work or who can be retrained". The proposal also prohibits contracting out, which infringes the employer's exclusive functions unser section 18, while it seeks to prevent the lay-off of employees who may be laid off as a result of the contracting out. This appears to be one of those proposals referred to in our decision in 1982 that falls equally within both sections 7 and 18. Accordingly, the proposal is allowed but only to the extent that it seeks to mitigate the effects of contracting out on employees.

Thus, it is our view that the union's proposals cannot prevent contracting out but may deal with the effects of contracting out on employees. The employer's rights under the Act cannot be completely eliminated and that is the effect of the union's proposals. Accordingly the proposal is disallowed.

The next proposal concerns a notice period of six months, which the union proposes, where the employer seeks to introduce new or modified equipment and/or associated changes in methods of operation which may result in employees being identified as surplus. Contrary to the employer's assertions the proposal does not interfere with the exclusive authority of the employer over work methods and procedures, rather it requires the employer to advise the union of the introduction

of such equipment or changes with a view to discussion in order to "minimize its adverse effects". There is nothing wrong with the proposal and it is allowed.

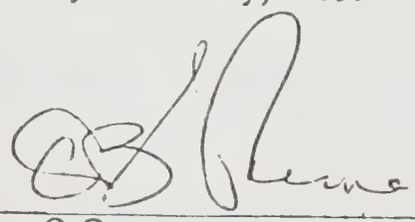
In our determination in October, we remitted to the union that portion of Article 24 (d) which dealt with training, at that time we stated:

> The third portion of the article provides that there should be "no minimum training to reach machine production specifications". The employer contends that the proposed article is ambiguous. The employer has no objection if the article is concerned with rates of pay, but it is concerned that it might deal with "training" which is an exclusive function of the employer under section 18.
>
> The union submits that this matter concerns rates of pay and explained its position thoroughly at the hearing.
>
> The difficulty with this item is that it is drafted in such a manner that it immediately raises a red flag. Where the union uses terminology that is the same as that used by the legislature to describe the exclusive functions of the employer, it should expect some resistance from the employer. The language of the clause could be better drafted so as to resolve any ambiguity and accordingly is remitted to the union on the same basis as the previous item.

Under Section 18 of the Act, "training and development" are part of the employer's exclusive function. It should have been apparent from our earlier determination that the proposed article was contrary to the Act because it attempted to interfere with the employer's right to train. The same error is continued in the present article. By restricting the right of the employer to fix a training period the union's proposal interferes with the employer's right to train under section 18 and particularly the period and length of training. This is not merely a rate of pay article nor is it an article which grants job security. It is a "wolf in sheep's clothing" proposal and interferes with the employer's right to train and accordingly is disallowed.

In an earlier decision on May 17, 1982, this Tribunal was called upon to deal with a union proposal concerning the monitoring of an employee's work performance by equipment (proposal 24 (d) (iii)) and found that the proposal was directed towards evaluation or appraisal and accordingly the proposal was disallowed. The proposal now put forth by the union concerns the monitoring of employees by equipment or "non-human monitoring capability". We are not convinced by the proposal or by the argument submitted that this is a health and safety matter and that we should depart from our earlier determination. The proposal is disallowed.

DATED at Toronto, Ontario this 28th day of January, 1985.



O.B. Shime, Q.C.
For the Majority

ONTARIO PUBLIC SERVICE
LABOUR RELATIONS TRIBUNAL

CASE T/19/84

THE CROWN IN RIGHT OF ONTARIO

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

PARTIAL DISSENT - (SUPPLEMENTARY DETERMINATION)

The initial award in this case was handed down on October 4, 1984. This board member supported the majority determination on all but two points.

Among those positions supported were instructions, and in fact, an opportunity, for the Union to redraft certain proposals that were found to be very broad and cumbersome in nature and scope.

Several of these type proposals were consequently rewritten by the Union to which the employer has now objected claiming again they fall outside the allowed perimeters of the (CECBA).

The Tribunal now faced with five contentious proposals has to decide their validity. Hence, the birth of a "Supplementary Determination" by the Chairman.

sections of the Act: Section 7 which authorizes the bargaining agent to bargain, inter alia, on "the classification and Job Evaluation System," and Section 18 which provides that it is the employer's exclusive right to determine, inter alia, the "classification of positions".

Few would argue that in construing a statute, the first efforts should be directed to carry out the intention of the legislature by reference to the words used and having regard to the scheme of the enactment.

In the case before us, the critical question would seem to be whether the conflict between Section 7 and Section 18 is such as to warrant giving effect to the words in one section while disregarding the conflict or parallel words in the other section. To answer that question, reference is made to several considerations that may be useful in determining the legislative intention.

1. The words which are in conflict in Section 7 and Section 18 were enacted by the legislature in The Crown Employees Collective Bargaining Amendment Act, 1974. The fact of the contemporaneous enactment would seem to deny the inference that the words in Section 7 should operate to negate the parallel words in Section 18.
2. Section 7 and Section 18 are mutually exclusive, that is to say, if a matter is within the scope of bargaining, it would not exist as a matter within management's rights and vice versa. This fact would

seem to work against the suggestion that Sections 7 and 18 are independent provisions and that the one may be construed without regard to the parallel provision in the other section.

3. As a rule of construction, if the words in Section 7 are to be interpreted to negate the parallel words in Section 18, a clear legislative intention to do so must be present. The following excerpt is from Maxwell, Interpretation of Statutes (Tenth Edition), p. 160:

> "The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it. It cannot be assumed that Parliament has given with one hand what it takes away with another."

4. Section 7 authorizes an employee organization to bargain on the terms and conditions of employement, however, that authority is said to exist "except as to matters that are exclusively the function of the employer under subsection 18(1)."

It is my respectful opinion that having regard to the scheme of the Act, the legislative history of the amendments to Section 7 and Section 18, the words used and the other considerations referred to above, one would have difficulty in concluding that the legislature has manifested the intention that in this context, the words in Section 7 are to be construed so as to sterilize or destroy the parallel words in Section 18.

The courts have frequently been called upon to interpret the conflict between Section 91 and Section 92 of the B.N.A. Act.

Perhaps, there are enough similarities in the issue before us for the following summary of the constitutional law issue to be of some relevance. The following excerpt is from 4 C.E.D. (Ontario 3d) para. 76.:

> Ss. 91 and 92 of the B.N.A. Act must be read together and the language of one interpreted and, where necessary, modified by that of the other, so as to reconcile the respective powers they contain and give effect to all of them. . . . The rule of construction is that general language in the heads of s. 92 yields to particular expressions in s. 91, where the latter are unambiguous.

It is useful to refer to the reasons in (T/7/78) when the Tribunal considered a job evaluation system in the context of Sections 7 and 18 of the Act as they now exist. The issue there was the same as in this case, that is to say,whether the provisions of two job evaluation systems were within the scope of bargaining. In that case, the learned Chairman, writing for the majority, observed on p. 14:

> "It is with that view of the legislation that we turn to this Union's proposals. It is apparent that under the existing legislation, the classification of positions remains the function of the employer. There is no dispute between the parties concerning that part of the legislation. As we have indicated, it is our view that the term 'classification of positions' is a term of art and it is intended that once positions are established that their placement in appropriate groupings or classifications remains with the employer. This will ultimately bear on the wage rates paid for performing certain functions. We view this omission from matters that are not negotiable to be an important exception. The Legislature has determined that this function remain the prerogative of the employer."

It is my respectful opinion that the design of a job evaluation system falls within the scope of bargaining; the implementation of a job evaluation system falls within the scope of bargaining, except as it relates to (i) the placement of positions in appropriate groupings or classifications; and (ii) the allocation of factor points to positions and classifications. For clarification (i) and (ii) fall within the "classification of positions" in Section 18 of the Act.

In the interest of fairness and harmonious relations, it is desirable that a consistent interpretation of these important provisions of the Act be available to all employees and employee organizations covered by the Act.

T/0031/84-1

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/31/84

BETWEEN: OPSEU (Mona Poltajainen)

Applicant

- and -

THE CROWN IN RIGHT OF ONTARIO
(Ministry of the Solicitor General)

Respondent

BEFORE: O. B. Shime, Q.C., Chairman
E.C. Witthames, Member
J. H. McGivney, Member

APPEARANCES AT THE HEARING: W. A. Lokay, and others, for the Union

W. J. Gorchinsky, and others, for the Employer

HEARING: October 15, 1984

This is an application pursuant to section 40 (1) of the Crown Employees Bargaining Act to determine whether Mona Poltajainen is an employee within the meaning of the Act.

The facts leading up to the bringing of the application are different from the usual case that one hears because Miss Poltajainen's employment is alleged to have ceased prior to the application having been made.

Miss Poltajainen had been employed as a Secretary 4 in the Office of the Commissioner of the Ontario Provincial Police from September 12, 1983 to May 28, 1984 and resigned from her employment on or about the 28th day of May 1984. She attempted to withdraw her letter of resignation on May 30, 1984 but the resignation was accepted and the withdrawal was rejected on May 31, 1984.

It is not for this Tribunal to characterize the circumstances under which Miss Poltajainen's employment is alleged to have ended; it is sufficient for our purposes to merely describe what happened.

During the period of her employment, Miss Poltajainen's position was excluded from the bargaining unit, and at no time did Miss Poltajainen or the union claim that she was an employee within the meaning of the Act.

On or about June 8, 1984, a grievance was filed by the union on Miss Poltajainen's behalf claiming that she was unjustly dismissed. Miss Poltajainen also grieved under the Public Service Act that she had been dismissed without just cause. This latter route is a method for non-bargaining unit employees to grieve.

On June 5, 1984 in a letter to the Ministry of the Solicitor General, the union asserted that Miss Poltajainen was an employee within the meaning of the Act and on June 14, 1984 it filed this application. The union maintained that it had not previously raised the matter of Miss Poltajainen's status with the employer because it had been unaware of the position and of its status treatment by the employer. The union claims that the question of status should be determined by the Tribunal in order to determine whether the Grievance Settlement Board or the Public Service Grievance Board should hear her grievance. At the hearing, the Tribunal was advised that the grievance before the Public Service Grievance Board was now withdrawn.

At the outset of this matter, the employer asserted that since Miss Poltajainen was no longer an employee at the date of the filing of this application, the Tribunal had no jurisdiction to entertain the application. The employer submitted that Miss Poltajainen was a citizen on June 14, 1984 and not an employee and that the filing of an application could not convert a citizen to an employee within the meaning of the Act. The employer also submits that it is the usual practice of the Tribunal to examine the duties and responsibilities of a person at the date of the making of an application and since Miss Poltajainen was not performing any duties on that date, that the Tribunal ought not to proceed.

The union asserts that since the dismissal was improper, Miss Poltajainen is either still employed or is deemed to be an employee. The union also

submits that Miss Poltajainen was at all material times an employee subject to a determination at arbitration as to whether she is still employed.

While not condoning the failure to assert an employee status prior to May 31, 1984, it is the Tribunal's view that the union is entitled to invoke Section 40 (1) of the Act in order to have Miss Poltajainen's status determined. Assuming, but without finally deciding, that Miss Poltajainen was an employee during the period of September 12, 1983 to May 31, 1984, it is our view that her employment did not terminate on May 31, 1984 until the facts surrounding the cessation of employment are examined by a Board of Arbitration.

Every termination or dismissal is subject to final review by a Board of Arbitration. An employer cannot dismiss an employee and then claim that the employee cannot invoke the grievance-arbitration process under the Collective Agreement because the dismissed person has no status as an employee. Where a person is dismissed, and chooses to arbitrate the grievance, the dismissal is not final until the arbitration board has had the opportunity to review the facts and circumstances surrounding the dismissal. The parties themselves have recognized that concept in their collective agreement. Thus Article 27.6.2 of the Collective Agreement between this union and the employer continues to recognize a dismissed person as an employee. That article provides:

> Any employee other than a probationary employee who is dismissed shall be entitled to file a grievance at the second stage of the grievance procedure provided he does so within (20) days of the dismissal.

Thus, even though a person is dismissed, employee status continues at the very least for the purpose of allowing the dismissed person to proceed to arbitration to have the circumstances of the dismissal reviewed.

In this case, Miss Poltajainen seeks to have her status as an employee determined in order to invoke the provisions of the Collective Agreement. If she was an employee within the meaning of the Act, she is entitled to the privileges afforded such employees. Miss Poltajainen is in a catch-22 situation. On the one hand, if she proceeds to arbitration, no doubt the argument will be raised that she is not an employee with status to invoke the provisions of the Collective Agreement where it could be determined that her employment relationship should continue.

On the other hand, the argument raised here could prevent her from having her employment status finally determined. In our view, it is appropriate that the matter be laid to rest and that Miss Poltajainen have her status determined. If she is an employee, her status as an employee continued past the events of May 31, 1984 until such time as a Board of Arbitration reviewed the matter. In these circumstances, it is our view that she has at least conditional status to enable the union to bring this application for her.

The preliminary objection is denied. Our determination in this regard is not to be construed as a finding on the events surrounding the events leading up to May 31, 1984 nor is it to be construed as a determination on her status.

The matter is referred to the Registrar to fix a date for continuation of this hearing.

DATED at Toronto, this 30th day of November, 1984.

"O. B. Shime"

O. B. Shime, Q.C. Chairman for the Tribunal

T|0031|84-2

ONTARIO PUBLIC SERVICE
LABOUR RELATIONS TRIBUNAL

180 DUNDAS STREET WEST. TORONTO, ONTARIO. M5G 1Z8 - SUITE 2100

TELEPHONE: 416/598-0688

T/31/84

B E T W E E N : OPSEU (Mona Poltajainen)

Applicant

- and -

The Crown in Right of Ontario
(Ministry of the Solicitor General)

Respondent

B E F O R E : Owen B. Shime, Q.C., Chairman
E. C. Witthames and
J. H. McGiveney, Q.C., Tribunal Members

A P P E A R A N C E S : D. V. MacDonald, and others, for the Applicant

Anne Warner McChesney, and others, for the Respondent

H E A R I N G : May 7, 1985

This is an application under Section 40(1) of the Crown Employees Collective Bargaining Act to determine whether Miss Mona Poltajainen, who is the secretary to the Executive Officer in the Office of the Commissioner of the Ontario Provincial Police, is an employee within the meaning of the Act.

Miss Poltajainen performs secretarial duties for the Executive Officer, John Houston, who is a Superintendent of the Ontario Provincial Police and who is Executive Officer to the Commissioner of the Ontario Provincial Police. Miss Poltajainen also performs some work for Inspector B. Sulston, Budget Co-Ordinator of the Ontario Provincial Police and for Superintendent J. Fullerton who is Protocol Officer and Senior Aide-de-Camp to the Lieutenant-Governor. At least seventy-five percent of her time, and perhaps more, is spent working for Superintendent Houston; she also does some work for Sargeant B. Curry.

Inspector Sulston is responsible for the finances of the Ontario Provincial Police. He is the person who compiles the overall Estimates that are submitted to the Government for funding. He receives financial reports and deals with specific financial situations within the Force and determines whether the spending is in accordance with the Budget. In addition, Inspector Sulston is responsible for the funding of secret undercover operations for the O.P.P.

Superintendent Fullerton arranges for security matters for the Lieutenant-Governor and arranges the security for various state occasions such as the opening of the Legislature and the visiting of royalty.

In addition, Miss Poltajainen does work for Acting Staff Sargeant B. Curry who is the Executive Assistant to Superintendent Houston.

Superintendent Houston is responsible for hiring employees, imposing discipline, including dealing with the first stage of the grievance procedure, and preparing performance appraisals for the staff. In addition, Superintendent Houston is the Secretary of the Management Committee of the O.P.P., which is comprised of members of the upper echelons of that Force, and is a policy advisor to the Commissioner of the O.P.P. who is the head person in that organization. Meetings of the Management Committee are held once per week, and deal with all issues requiring high level decisions. As executive officer to the committee, Superintendent Houston takes minutes which are, in turn, transcribed by his secretary.

The minutes of the Management Committee are considered to be confidential and Superintendent Houston is responsible for their security. Miss Poltajainen prepares the minutes and distributes copies to members of the Management Committee.

Part of her job is to maintain the files and prevent other people from gaining access to them.

At the Committee meetings operational matters are discussed, including the status of highly secret undercover operations, their progress, the dangers, if any to members of the Force, specific secret arrangements, suspects and their identities and internal investigations respecting members of the Force suspected of criminal activity. In addition, disciplinary matters concerning members of the Force are discussed. The Management Committee is also concerned with and discusses security arrangements for visiting dignitaries.

Superintendent Houston is also involved in the work of the Ministry of the Solicitor General and, more particularly, in connection with the Senior Management Committee of the Ministry, which is concerned with public safety. Upon receipt of the agenda, Superintendent Houston prepares materials for the Commissioner with respect to the issues related to the O.P.P. and is responsible for the minutes of the meeting as a delegate of the Commissioner.

Superintendent Houston also tables items for discussion at those meetings which are related to the O.P.P. . For example, Superintendent Houston is involved in matters where the O.P.P. is considering a takeover of municipal

policing. He updates the material and briefs the Commissioner in order for the Commissioner to be able to advise the Minister with respect to these matters. Some of these matters are of a highly confidential nature and relate to political decisions, or are related to the activities of the Minister and are not for public knowledge. Such highly confidential minutes are secured and maintained by Superintendent Houston and looked after by Miss Poltajainen. He is also responsible for certain briefings for the Commissioner which are in writing.

Miss Poltajainen also prepares Issue Sheets which consist of confidential advice to the Minister about highly public or sensitive issues and which, in turn, have been prepared by various divisions or branches of the O.P.P. She also maintains and deals with highly confidential status reports which outline activities of the O.P.P., such as special investigations, progress of undercover agents and the money being spent for such projects.

Superintendent Houston is also responsible for certain confidential policy matters such as the Force's position on the policing of waterways, which involves responsibility of other police agencies such as the R.C.M.P. and municipal forces. He also is involved with reports to the Deputy Minister with respect to the financial accountability concerning O.P.P. projects which, in turn, have to be accounted for by Management

Board of Cabinet.

Also, Superintendent Houston has been involved in negotiations with the Ontario Provincial Police Association on such matters as the compressed work week.

The union conceded that Superintendent Houston is employed in a managerial and confidential capacity within the meaning of section 1(1) of the Crown Employees Collective Bargaining Act. Further, the union submitted that Miss Poltajainen's duties are of a non-managerial, ordinary secretarial type and include typing and filing and, accordingly, she ought not be excluded from the bargaining unit. The union also maintained that although she is privy to confidential information, Miss Poltajainen simply has access and that she has no role in the formulation of the information.

The employer maintained that Superintendent Houston is employed in a managerial and confidential capacity within the meaning of section 1(1)(*i*)(i), (ii), (iii) and (iv) of the Act and that Miss Poltajainen is employed in a position confidential to Superintendent Houston within the meaning of section 1(1)(*i*)(vi) of the Act. The employer further submitted that this was an appropriate case for the Tribunal to exercise its discretion under section 1(1)(*i*)(viii) of the Act.

The relevant provisions of the Crown Employees

Collective Bargaining Act, as indicated by the arguments before the Tribunal, are contained in section 1(1)(*i*) which provides as follows:

> 1. (1) In this Act,
>
> ...,
>
> (*i*) "person employed in a managerial or confidential capacity" means a person who,
>
> (i) is employed in a position confidential to the Lieutenant Governor, a Minister of the Crown, a judge of a provincial court, the deputy head of a ministry of the Government of Ontario or the chief executive officer of any agency of the Crown,
>
> (ii) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the Government or an agency of the Crown or in the formualtion of budgets of the Government or an agency of the Crown,
>
> ...
>
> (iv) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
>
> ...
>
> (vi) is employed in a position confidential to any person described in subclause (i), (ii), (iii), (iv) or (v),
>
> ...
>
> (viii) is not otherwise described in subclause (i) to (vii) but who in the opinion of the Tribunal should not be included in a bargainining unit by reason of his duties and responsibilities to the employer;

That section has been dealt with in an earlier decision by this Tribunal in Crown in Right of Ontario and OPSEU (T/11/76) which was concerned with the private secretary to the Director of Forensic Sciences at the Centre for Forensic Sciences. In that case, this Tribunal said, at page 11,

> "... Turning more specifically to our legislation, we find, as did the Ontario Labour Relations Board, that wording as contained in subsection 1(1)(m)(vi) relates to persons employed in a confidential capacity in matters other than labour relations. But the clear wording of the statutes, both C.E.C.B.A. and the Community Colleges Collective Bargaining Act, does not simply exclude persons employed in a confidential capacity. The clear wording of the section excludes "a person who is employed in a position confidential to..." an enumerated group of people. What the subsection does not seek to exclude, in our view, is the category of persons who may have a conflict of interest because of their confidential knowledge. The thrust of the subsection is intended to have a more positive effect; it is intended to exclude persons in order to facilitate the operations of a management team. The subsection recognizes that persons in government are required in key decision making roles both with respect to formulating government objectives and policy and also with respect to dealing with employer-employee relations. It envisions a team concept of governmental decision making in which there are employee adjuncts to the decision making process who may be said to be an integral part of the team notwithstanding that they do not have a decision making role..... What subsection (1)(m)(vi) appears to contemplate is that persons who are closely allied or integrated with government decision making be excluded from collective bargaining. The concept was, perhaps, best expressed by Mr. Lucas when he referred to Miss Smith as part of the executive group. Thus what is contemplated by the subsection in our view is the exclusion from collective bargaining of persons who are considered part of the executive group and necessarily incidental to its function or as the statute states "employed in a position confidential to any person" who is a member of the executive group as enumerated in the preceding parts of Section 1(1)(m). This does not contemplate persons who do the odd piece of clerical or secretarial work for a member of the executive group, but it clearly contemplates someone such as Miss Smith whose full time is engaged in the performance of duties and responsibilities for the chief executive officer of the Centre of Forensic Sciences, who, is involved in a substantial number of matters that are of an executive nature and are to be considered confidential."

Having regard to the evidence and to the submissions including the union's concessions, it is clear that Superintendent Houston is part of the management team. He is involved in all the senior level management meetings in various capacities within the O.P.P. and, quite simply, he is part of the executive group of the Ontario Provincial Police.

It is clear that Miss Poltajainen does not do the odd piece of clerical or secretarial work in that group. She is involved in the typing and the maintaining of documents that are of an executive nature within the O.P.P. and which are confidential. The majority of her time is involved in performing secretarial services for Superintendent Houston. In addition, the work that she performs for Inspector Sulston concerning the finances of the O.P.P. and the funding of its various operations is of a highly confidential nature. There is no question that both Superintendent Houston and Inspector Sulston require the kind of services that Miss Poltajainen supplies in the performance of their duties and she is an employee adjunct who is involved with the management group and is an integral part of that management team. It could not function effectively without the kind of service that a person in Miss Poltajainen's position supplies.

In the result, it is our view that Miss Poltajainen

is employed in a position that is confidential to Superintendent Houston and to Inspector Sulston and that she is an integral part of the management team. Accordingly, she is not an employee within the meaning of the Crown Employees Collective Bargaining Act.

DATED at the City of Toronto this Fourth day of June, 1985.

Owen B. Shime, Q.C.
for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/40A/84

BETWEEN: The Crown in Right of Ontario
(Workers' Compensation Board)

Applicant

- and -

Canadian Union of Public Employees
(Local 1750)

Respondent

BEFORE: O.B. Shime, Q.C., Chairman
Dr. C. Jecchinis, Member
J.H. McGivney, Q.C., Member

APPEARANCES AT THE HEARING: M. Mitchell, Counsel and Others,
for the Union

D. K. Gray, Counsel and Others,
for the Employer

DATE OF HEARING: November 9, 1984

The matter currently before us concerns the terms of a job evaluation system that is part of the Collective Agreement between the parties. There has been a stormy legal history leading up to the insertion of the job evaluation system in the Collective Agreement and that history is recounted in a decision of this Tribunal dated January 24, 1983 (T/19/81).

Essentially, the employer, in the past, had failed to avail itself of the clear language of the Act to determine whether the union proposals concerning the job evaluation system came within the scope of collective bargaining under the Act. In an earlier application, this Tribunal was of the view that the employer by its conduct over a lengthy period of time had, in effect, chosen the arbitration forum to decide that issue and thus the Tribunal determined that the employer had waived its right to proceed to the Tribunal and had elected to have the board of arbitration decide the issue. The Tribunal also decided that the application was not timely.

The next round of bargaining is upon us and the employer has returned to the Tribunal seeking a determination as to whether the job evaluation system is properly within the scope of collective bargaining. The employer asserts that this is a new day and a new agreement and that the Tribunal has jurisdiction to deal with the matter. The union insists that this issue was decided by the Tribunal and that since we had decided the matter we ought not to embark on a second determination. The union also submits that, in view of the past history, the employer's position concerning the job evaluation system constitutes bargaining in bad faith and its resort to the Tribunal is an abuse of process.

The legal aspects of this case were well argued and developed by both counsel for the employer and counsel for the union. It is our view, however, that we ought not to deal with the issues on a strict technical or formal basis but to consider the labour relations implications of the matter. Our concern is two fold - first, if this Tribunal does not deal with the merits, the employer will feel frustrated that a final decision on the substance of the job evaluation scheme has not been rendered by this Tribunal. This may in the future lessen the employer's commitment to the scheme and to its administration and implementation. The frustration of the employer in not having the merits properly dealt with would thus create future conflict in the relationship. Second, should there be changes requested in the current scheme by the union in the future, there is no doubt that it would inspire an argument that the changes, if granted, would tilt the scheme beyond the ambit of permissible bargaining. Thus unlike other agreements, this particular matter would be frozen or the union would continuously run up against the argument respecting jurisdiction. It is for these reasons that this Tribunal feels it is necessary to deal with the merits of the scheme rather than deciding the issue on legal or technical grounds.

In an earlier decision of this Tribunal (T/9/78), we determined that the union could bargain about job descriptions but not about classification. Under Section 7 of the Act it is permissible for the union to bargain about "... the classification and job evaluation system ..." whereas under Section 18 of the Act it is the exclusive function of the employer to determine the "classification of positions". There is a great deal to be desired in the language of the Act with

respect to the matter at hand and particularly the use of the word "classification" in both the permitted and prohibited areas of bargaining. This Tribunal is thus required to attempt to reconcile these ostensibly conflicting provisions of the legislation.

In attempting to reconcile those two sections of the Act we indicated that in accepting or rejecting proposals put forth by the parties we would carefully scrutinize the nature and effect of these proposals. The applicable tests are set forth in our reasons in (T/32/81). In a more particular sense, and as previously indicated, we determined with respect to the issue, in this case, that it was permissible for the union to bargain about job positions.

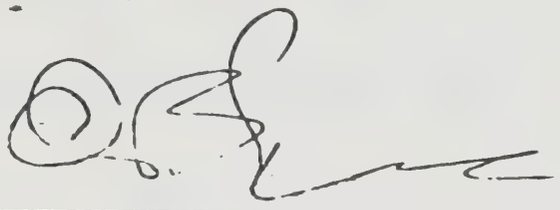
The system in dispute uses a weighted point job evaluation which entails the description and evaluation of jobs within the bargaining unit. The methods used to evaluate the jobs are more fully set out in the Collective Agreement. We recognize that once the jobs are evaluated in accordance with the system under the agreement that the next logical step is to place jobs similarly rated within the same grouping. Once that logical step is taken the process is tantamount to classifying employees. But even though that result may appear to be egregious it does not offend the provisions of the Act or the tests that this Tribunal has enunciated in its various attempts to interpret the Act.

The union has some rights in negotiating about "the classification and job evaluation system" under Section 7 of the Act. Also the nature and effect of the language in the Collective Agreement is to deal with job positions. The logic of utilizing such a system may propel the parties to certain conclusions about classifying the jobs but that does not derogate from the basic and permissible area of negotiation (and thus arbitration) which permits the parties to negotiate about job positions. Even though the scheme may touch on classification, as long as the nature and effect of the scheme falls within the permissible area of negotiation it does not offend Section 18 of the Act.

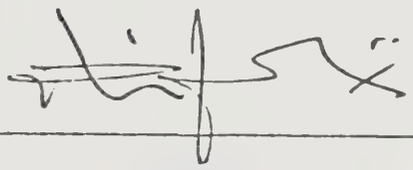
In the result it is our view, after considering the scheme in the agreement, that the scheme is primarily concerned about job positions and does not violate the prohibited sections of the Act.

The application is dismissed.

DATED at Toronto, Ontario this 22nd day of March, 1985.



O. B. Shime, Q.C. - Chairman



Dr. C. Jecchinis, Member

"I dissent"

J. H. McGivney, Q.C., Member

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/40A/84

BETWEEN: The Crown in Right of Ontario
(Workers' Compensation Board)

Applicant

-and-

Canadian Union of Public Employees
(Local 1750)

Respondent

DISSENT

I regret that I am unable to agree with the decision of the majority. The issue before the Tribunal is whether or not the elements of the Job Evaluation System contained in an appendix to the collective agreement are within the scope of bargaining determined in accordance with the provisions of the Crown Employees Collective Bargaining Act (the "Act"). By way of clarification, it should be noted that the Job Evaluation System was imposed on the parties as a result of an interest arbitration. The employer has urged that parts of the Job Evaluation System are outside the scope of bargaining.

This issue arises because of the conflict between two

sections of the Act: Section 7 which authorizes the bargaining agent to bargain, inter alia, on "the classification and Job Evaluation System," and Section 18 which provides that it is the employer's exclusive right to determine, inter alia, the "classification of positions".

Few would argue that in construing a statute, the first efforts should be directed to carry out the intention of the legislature by reference to the words used and having regard to the scheme of the enactment.

In the case before us, the critical question would seem to be whether the conflict between Section 7 and Section 18 is such as to warrant giving effect to the words in one section while disregarding the conflict or parallel words in the other section. To answer that question, reference is made to several considerations that may be useful in determining the legislative intention.

1. The words which are in conflict in Section 7 and Section 18 were enacted by the legislature in The Crown Employees Collective Bargaining Amendment Act, 1974. The fact of the contemporaneous enactment would seem to deny the inference that the words in Section 7 should operate to negate the parallel words in Section 18.
2. Section 7 and Section 18 are mutually exclusive, that is to say, if a matter is within the scope of bargaining, it would not exist as a matter within management's rights and vice versa. This fact would

seem to work against the suggestion that Sections 7 and 18 are independent provisions and that the one may be construed without regard to the parallel provision in the other section.

3. As a rule of construction, if the words in Section 7 are to be interpreted to negate the parallel words in Section 18, a clear legislative intention to do so must be present. The following excerpt is from Maxwell, Interpretation of Statutes (Tenth Edition), p. 160:

> "The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it. It cannot be assumed that Parliament has given with one hand what it takes away with another."

4. Section 7 authorizes an employee organization to bargain on the terms and conditions of employement, however, that authority is said to exist "except as to matters that are exclusively the function of the employer under subsection 18(1)."

It is my respectful opinion that having regard to the scheme of the Act, the legislative history of the amendments to Section 7 and Section 18, the words used and the other considerations referred to above, one would have difficulty in concluding that the legislature has manifested the intention that in this context, the words in Section 7 are to be construed so as to sterilize or destroy the parallel words in Section 18.

The courts have frequently been called upon to interpret the conflict between Section 91 and Section 92 of the B.N.A. Act.

Perhaps, there are enough similarities in the issue before us for the following summary of the constitutional law issue to be of some relevance. The following excerpt is from 4 C.E.D. (Ontario 3d) para. 76.:

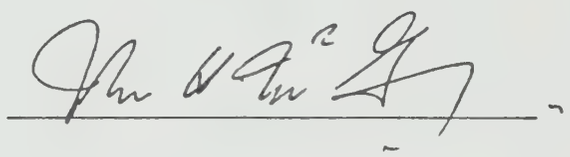
> Ss. 91 and 92 of the B.N.A. Act must be read together and the language of one interpreted and, where necessary, modified by that of the other, so as to reconcile the respective powers they contain and give effect to all of them. . . . The rule of construction is that general language in the heads of s. 92 yields to particular expressions in s. 91, where the latter are unambiguous.

It is useful to refer to the reasons in (T/7/78) when the Tribunal considered a job evaluation system in the context of Sections 7 and 18 of the Act as they now exist. The issue there was the same as in this case, that is to say,whether the provisions of two job evaluation systems were within the scope of bargaining. In that case, the learned Chairman, writing for the majority, observed on p. 14:

> "It is with that view of the legislation that we turn to this Union's proposals. It is apparent that under the existing legislation, the classification of positions remains the function of the employer. There is no dispute between the parties concerning that part of the legislation. As we have indicated, it is our view that the term 'classification of positions' is a term of art and it is intended that once positions are established that their placement in appropriate groupings or classifications remains with the employer. This will ultimately bear on the wage rates paid for performing certain functions. We view this omission from matters that are not negotiable to be an important exception. The Legislature has determined that this function remain the prerogative of the employer."

It is my respectful opinion that the design of a job evaluation system falls within the scope of bargaining; the implementation of a job evaluation system falls within the scope of bargaining, except as it relates to (i) the placement of positions in appropriate groupings or classifications; and (ii) the allocation of factor points to positions and classifications. For clarification (i) and (ii) fall within the "classification of positions" in Section 18 of the Act.

In the interest of fairness and harmonious relations, it is desirable that a consistent interpretation of these important provisions of the Act be available to all employees and employee organizations covered by the Act.



Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8 416/598-0688

T/42/84

BETWEEN:

Trusteeship
Canadian Union of Public Employees,
Local 767

Applicant

- And -

The Crown in Right of Ontario
(Ministry of Housing)

Respondent

BEFORE:

P. Picher, Chairman
W. Walsh, Member
R. Gallivan, Member

FOR THE UNION:

Mr. Michael Mitchell, Counsel
Sack, Charney, Goldblatt & Mitchell
Barristers & Solicitors

FOR THE EMPLOYER:

A. R. Rae, Manager
Staff Relations Section
Ministry of Housing

FOR THE EMPLOYEES:

C. Bredt, Counsel
Borden & Elliot
Barristers & Solicitors

HEARING DATE:

May 12, 1986

DECISION

An application for extension of trusteeship over Local 767 of the Canadian Union of Public Employees has been filed by the applicant national organization of C.U.P.E. pursuant to the provisions of section 46 (2) of the Crown Employees Collective Bargaining Act, R.S.O. 1980 c. 108 as amended. The application is for an extension to the existing trusteeship for a one year period running from June 5, 1985 until June 7, 1986.

The national has confirmed to the Tribunal that effective June 7, 1986 control over the affairs of Local 767 will be assumed by a newly created local, Local 3096, for a provincial bargaining unit and Local 767 for the Metropolitan Toronto bargaining unit. The national organization is confident that from June 7th these locals will be able to operate without trusteeship. The Tribunal has been given no cause to believe otherwise.

An objection to the extension of the trusteeship for the period running from June 5, 1985 to June 7, 1986 was filed by two employees in the bargaining unit, A. Lombard and B. Williams. The basis of their objection is that the national organization does not have status to act as trustee due to the provisions of section 1 (1) (g) (iv) of the Act. Counsel for the Objectors submits that when the national organization assumed trusteeship of Local 767 it became the employee organization or bargaining agent in place of Local 767. Counsel argues that the national cannot properly have status as an employee organization under

the Act because it "supports ... (a) political party" (The New Democratic Party) within the meaning of Section 1 (1) (g) (iv) of the Act. Section 1 (1) (g) (iv) stipulates that an "employee organization" does not include an organization of employees that supports a political party. Pursuant to its submission that the national organization supports the N.D.P., counsel for the Objectors filed material purportedly prepared on behalf of the N.D.P. under the Canada Elections Act for the periods of 1982, 1983 and 1984. These documents were not subjected to formal proof and counsel for the applicant did not consent to their admissibility.

In the alternative, counsel for the Objectors argued that even if the national organization would not, as trustee, become the bargaining agent, such that section 1 (1) (g) (iv) would apply to it directly and preclude it from in fact having status as an employee organization under the Act, the local, Local 767, is similarly precluded from having status as an employee organization because it gives financial support to the national and the national, in turn, supports the N.D.P.

By way of remedy, counsel for the Objectors asks that the Tribunal dismiss the application for the extension of the trusteeship and declare pursuant to section 25 of the Act that C.U.P.E. national and/or Local 767 no longer represent(s) the employees in the bargaining unit.

Additional objections raised in the initial filings by the Objectors were withdrawn for the purposes of this application upon the stated intention of the Tribunal to proceed with all matters of objection on the date of the hearing. The Tribunal determined that sufficient notice of the proceeding had been given to the

Objectors to require that they proceed with all matters of objection on the designated hearing date. No reason for the Objectors' apparent delay in obtaining counsel was given. The Tribunal did convey its willingness to grant an adjournment of some hours' duration within the hearing day to accomodate the Objectors. Counsel for the Objectors declined, however, and withdrew the remaining objections.

The following sections of the Act are relevant to the Tribunal's determination:

1. (1) In this Act,

...

(g) "employee organization" means an organization of employees formed for the purpose of regulating relations between the employer and employees under this act, but does not include such an organization of employees that,

...

(iv) supports or requires its members who are employees otherwise to support any political party, or

25. (1) Where the Tribunal is advised by an employee organization that it wishes to be released of its representation rights in respect of a bargaining unit or where the Tribunal, upon application by the employer or any employee in a bargaining unit represented by an employee organization, determines that the employee organization has ceased to act on behalf of the employees, the Tribunal shall declare that the employee organization no longer represents the employees in the bargaining unit.

(2) Where the Tribunal,

(a) Upon application thereto by the employer or any employee concerned, determines that an employee organization would not, if it were applying for

representation rights in respect of a bargaining unit, be granted such rights by the Tribunal by reason of failure to qualify under clause 1 (1) (g); or

(b) is satisfied that an employee organization has obtained representation rights in respect of a bargaining unit by fraud, -

the Tribunal shall declare that the employee organization no longer represents the employees in the bargaining unit.

46. (1) If the autonomy of an employee organization is suspended under the constitution and by-laws of its parent body, written notice thereof shall be given the Tribunal by the parent body within thirty days of the commencement of such suspension together with a statement in the prescribed form, verified by the affidavit of its principal officers, setting out the terms under which supervision or control is to be exercised and it shall, upon the direction of the Tribunal, file such additional information as the Tribunal from time to time may require.

(2) Any such supervision or control shall not continue for more than twelve months from the date of such suspension but such supervision or control may be continued for such further period as the Tribunal may prescribe. 1972, c. 67, s. 44.

Section 10 of the Regulation 232, R.R.O., 1980 made under the Act provides as follows:

10. All persons employed in the work of Ontario Housing Corporation within The Municipality of Metropolitan Toronto other than,

(a) foremen;

(b) office staff;

(c) persons appointed under the Public Service Act; and

(d) persons in the temporary service class who are not members of Local 767 of the Canadian Union of Public Employees by reason of their membership in another organization,

> are designated as a unit of employees that is an appropriate bargaining unit for collective bargaining purposes, and Local 767 of the Canadian Union of Public Employees is designated as the employee organization that shall have representation rights in relation to such bargaining unit. O. Reg. 577/72, s. 10.

Section 10 of Regulation 232 stipulates that Local 767 of C.U.P.E. is designated as the employee organization that has the representation rights in relation to the Metropolitan Toronto bargaining unit. Section 46 of the Act which provides for trusteeships over an employee organization and extensions thereto does not suggest that the while under trusteeship a parent body itself becomes the "employee organization" rather than the local. Moreover, counsel for the Objectors was unable to point to any jurisprudence that would support that result. In these circumstances and having regard to the full provisions of the Act, the Tribunal is not persuaded that C.U.P.E. Local 767 would lose its status as employee organization to the national during trusteeship. Accordingly, the status of C.U.P.E. national as an employee organization under Article 1 (1) (g) (iv), whatever that might be, does not adversely affect the validity of the trusteeship or of bargaining rights.

Turning to the alternative submission of the Objectors, the Tribunal is not persuaded that section 1 (1) (g) (iv) denies Local 767 status as an employee organization. Even if "supports ... (a) political party" in section 1 (1) (g) (iv) could be read as meaning "supports directly or indirectly", a matter upon which we make no determination, the Tribunal has before it insufficient evidence to conclude that the Local supports the N.D.P. There is no evidence of direct support. As well,

there is no evidence before this Tribunal that any monies given by the Local to the national were specifically used by the national to support a political party. Thus we cannot make a finding of indirect support either.

On the basis of the foregoing the Tribunal concludes that the Objectors have failed to satisfy it that an extension of the trusteeship until June 7, 1986 would be contrary to the Act.

Having regard to the submissions of the parties the Tribunal grants the requested extension of the Trusteeship for the one year period running from June 5, 1985 until June 7, 1986.

The application is hereby allowed.

DATED at Toronto, Ontario this 29th day of May, 1986.

P. Picher
for the Tribunal